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THE
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CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXXI.

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AMERICAN STATE REPORTS.

VOL. LXXXI.

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CASES
IN THE
SUPREME COURT
OF
GEORGIA.

MEYER v. STATE.

[112 Ga. 20, 37 S. E. 96.]

LOTTERIES—NICKEL IN SLOT MACHINES.—A person who maintains a "nickel in the slot" machine displaying a "poker hand," by which a person depositing a nickel and playing the machine is entitled to a cigar or a package of chewing-gum, each valued at five cents, and in addition thereto, a prize according to the "hand" displayed, violates a statute providing that no person "shall keep, maintain, employ, or carry on any lottery, or other scheme or device for the hazarding of any money or valuable thing."

LOTTERIES—NICKEL IN SLOT MACHINES.—Any scheme or device, such as a "nickel in the slot machine," operated by a person, by which one participating therein may either lose the money invested, or get more than his money's worth, the operator retaining the money so lost, is a scheme or device for the hazarding of money, within the meaning of a statute prohibiting such hazard.

J. S. and W. T. Davidson and H. C. Roney, for the plaintiff in error.

C. H. Cohen, solicitor for the defendant in error.

²⁰ **COBB, J.** Meyer was arraigned on an accusation under the Penal Code, section 407, which declares that "No person, by himself or another, shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing." The accused was tried by the judge of the city court of Richmond county, presiding without a jury, upon an agreed statement of facts, and was convicted. That portion of the agreed statement of facts upon which the judgment of conviction was based was, in sub-

stance, as follows: The accused was a wholesale and retail dealer in cigars and chewing-gum. On the day alleged in the accusation he was operating a "nickel slot trade machine."²¹ The manner of the operation of this machine is as follows: A nickel is placed in the slot, a handle is pulled down, a wheel within the machine revolves, and when it comes to a stop the number of cards constituting a "hand" in a game of poker are exhibited. The person depositing the nickel is entitled to a cigar or package of chewing-gum, each valued at five cents, and in addition thereto to a prize according to the hand displayed; the highest prize being one hundred cigars or packages of chewing-gum for a "royal flush," and the lowest two of either commodity for two jacks or a better pair. Many customers purchase the same cigar and the same chewing-gum over the counter and pay a nickel therefor, while others purchase through the operation of the machine and take the chance of getting more than the value of their money. A portion of the agreed statement of facts the judge refused to consider. These facts are substantially as follows: There is no element of chance in the operation of the machine, except that of getting more than a nickel's worth. The use of the machine is entirely voluntary to the customer, and the same is operated as an inducement to trade, the result being that for every cigar sold through the machine the accused gets about four cents instead of five cents, and about the same price for chewing-gum, but on account of the operation of the machine the amount of business done is largely increased. This is a case made for the purpose of testing the question as to whether one who uses such a machine in his business violates the law. The accused made a motion for a new trial, which was overruled, and he excepted.

We do not think the judge erred in refusing to consider that portion of the statement of facts above detailed. The judgment was right on the facts passed upon by him; and even if the facts which he refused to consider had been treated as properly before him, the judgment should have been the same. A lottery is defined to be: "A scheme for the distribution of prizes by lot or chance": Webster's International Dictionary. "A hazard in which sums are ventured for the chance of obtaining a greater value": Worcester's Dictionary. For other definitions, see Anderson's and Bouvier's Law Dictionaries. If, then, the scheme or device for the hazarding of money which is prohibited by the Penal Code must be of the same nature as a lottery, before anyone could be held to have violated the law who had not actually

run a lottery, it must be shown that he engaged ²² in a scheme of similar nature—that is, a scheme or device for the distribution of prizes by lot or chance. We will not undertake to demonstrate that the scheme or device resorted to by the accused was a lottery, though this position, as will appear from the citations below, could be abundantly supported by authority. But we will consider the question as to whether he engaged in a scheme having for its purpose the distribution of prizes by lot or chance. Any scheme or device operated by a person, by which one participating therein might either lose the money invested or get more than his money's worth, the operator retaining the money so lost, is a scheme or device for the hazarding of money, within the meaning of the section of the Penal Code above quoted: *Wilson v. State*, 67 Ga. 658. So, it was held in *Kolshorn v. State*, 97 Ga. 343, 23 S. E. 829, that where the accused kept and maintained a machine so contrived that if one dropped a nickel in the slot therein he would either lose the nickel or win fifteen cents, he was guilty of a violation of the law contained in the section above quoted. In the case of *Prendergast v. State* (Tex. Cr. App.), 57 S. W. 850, a scheme very similar to the one referred to in *Kolshorn v. State*, 97 Ga. 343, 23 S. E. 829, was held to be a lottery. In *Christopher v. State* (Tex. Cr. App.), 53 S. W. 852, it was held that a slot machine similar in its method of operation to those described in the two cases last referred to was a gaming device within the meaning of the statutes of Texas on the subject of gaming. In *Reeves v. State*, 105 Ala. 120, 17 South. 104, it appeared that the accused owned and operated a device consisting of a circular board, in the center of which was an arrow turning on a pivot, pointing to numbers around the edge of the board. Opposite to each number was placed an article of jewelry ranging in value from five cents to one dollar. Upon paying ten cents one was allowed the privilege of whirling the arrow, and was entitled to receive the article of jewelry opposite the number on which the arrow stopped, or its equivalent in value. The scheme was held to be a lottery. In *Chavannah v. State*, 49 Ala. 396, a circular device revolving on a pivot, and which had a fixed index pointing to numbers or figures which corresponded with certain numbers or figures on cards sold to players, who sometimes won but more often lost, was held to be "a device of like kind" with a lottery.

But it is said that none of the cases above referred to are controlling in the present case, for the reason that in all of them

there ²³ was a mutuality of risk; and that the scheme operated by the accused was not within the meaning of our statute, because it imposed no risk whatever upon the customer, the whole risk being assumed by the accused. In *Quarles v. State*, 5 Humph. 561, the supreme court of Tennessee held that a sale of goods above their market value, to be paid for when a particular candidate is elected at an election then pending, is betting on an election, but that the testimony must show that the goods were sold at a price above their value. This decision rested upon the idea that there was no mutuality of risk in the wager, unless the purchaser agreed to pay more than the goods were worth. In *Shumate's Case*, 15 Gratt. 653, the court of appeals of Virginia, on a state of facts identical with those in the case just referred to, reached exactly the opposite conclusion. In reply to the suggestion that there was no mutuality of risk, Robertson, J., in the opinion, says: "It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss." In *Bell v. State*, 5 Sneed, 507, it was held that the fashionable sporting artifice, commonly called "a gift enterprise," by which a merchant or tradesman sells his wares for their market value, but, by way of inducement, gives to each purchaser a ticket, which entitles him to a chance to win certain prizes, to be determined after the manner of a lottery, is common gaming. Caruthers, J., in referring to the scheme described in the evidence, says: "Is it not that species of gaming called a lottery? A small sum is ventured for the chance of a greater, one dollar or five dollars perhaps, for a book, and the chance of a watch, valued at forty, or a set of instruments at two dollars, or a box of wafers worth ten cents. If the book is certain, without hazard, the watch is not; that depends upon chance. So all pay their money, at least in part, for the chance of winning a prize of greater or less value. According to every correct idea of legal definition, this must be gaming, and all concerned are guilty of that ²⁴ offense. All these artifices to evade and cheat the law and entrap the unwary are but ag-

gravations of the offense." In *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171, the indictment alleged that the defendants published an advertisement that they would, on a day named, give to the person buying goods at their store to the amount of fifty cents, and guessing nearest the number of beans in a glass globe in their window, a gold watch. This was held to be a good indictment under a statute making it penal to advertise a lottery. In *Davenport v. Ottawa*, 54 Kan. 711, 45 Am. St. Rep. 303, 39 Pac. 708, it appeared that a firm placed in its window a locked box containing twenty-five dollars, and advertised that all persons buying goods in their store to the amount of fifty cents or more would receive a key, and only one key would be given out which would unlock the box, and that the person receiving the key which would unlock the box would be given the twenty-five dollars. The accused sold goods to various persons at the usual and ordinary prices without extra charge on account of the key, and gave to each of these persons a key to which was attached a card stating the above offer. It was held that these transactions were in effect sales of merchandise and lottery tickets for an aggregate price, and that the conviction of a member of the firm was proper under an ordinance prohibiting the sale and offering for sale of lottery tickets. In *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532, it appeared that the proprietors of a newspaper offered to each person who would subscribe, at the usual subscription prices, for the paper during a given year, a ticket which entitled the holder to participate in a distribution of prizes. The distribution was made by lot. It was held: "That the scheme was a lottery within the purview of the criminal laws; and it made no difference that the tickets were not sold, but were given to subscribers and to no one else." It was said in the opinion: "The fact that the subscription price of the 'Times' was not increased does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper." In *United States v. Wallis*, 58 Fed. 942, the accused was indicted for sending through the mails a newspaper containing an advertisement of a lottery. It appeared that the scheme advertised was very similar to the one described in the case last above referred to. A demurrer to the indictment was overruled, the court resting its decision upon the case of *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. Rep. 409. In that case the supreme court held that a scheme of ²⁵ the Austrian government to facilitate the sale of its bonds, which were

sold at their face value, by which prizes of different value were awarded to different purchasers by drawings by chance, was a lottery. The supreme court of New Jersey held that a public exhibition where prizes of different values were distributed by chance to the holders of tickets to the performance was a lottery: *State v. Shorts*, 32 N. J. L. 398, 90 Am. Dec. 668. From the authorities above cited, it is clear that the accused in the present case, if not guilty of operating a lottery, was undoubtedly guilty of maintaining a scheme or device of a similar nature thereto.

Judgment affirmed.

All the justices concurring.

A SLOT MACHINE is a lottery: *Loiseau v. State*, 114 Ala. 34, 62 Am. St. Rep. 84, 22 South. 138. It is a gambling device, and keeping it a criminal offense: *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322.

NANCE v. STOCKBURGER.

[112 Ga. 90, 37 S. E. 125.]

COSTS—LIABILITY OF "NEXT FRIEND."—If an action is brought and voluntarily dismissed by the next friend of an alleged imbecile, it is erroneous to tax costs against the latter and enter judgment against him therefor. In such case, the next friend is primarily liable for the costs, the estate of the imbecile being liable over, provided the fact that he is an imbecile and that the action was brought in good faith is proved.

R. J. and J. McCamy, for the plaintiff in error.

Payne & Payne, for the defendant in error.

⁹¹ LEWIS, J. S. E. and C. M. Stockburger, as next friends of John A. Nance, filed a petition against R. W. and Emma Nance, to set aside a deed from John A. to R. W. and Emma Nance, on the ground that John A. was incapable of making a deed, and was unduly influenced thereto by said R. W. and Emma. It seems that this came up for trial at the August term, 1898, of Catoosa superior court, and resulted in a verdict for the plaintiffs. A motion for a new trial was made by the defendants, which being overruled, the case was carried by writ of error to the supreme court, where the decision of the lower court was reversed. The case was again called for a hearing

at the August term, 1900, of Catoosa superior court, when the plaintiffs voluntarily dismissed their case, and moved the court to grant an order signing up judgment for the costs in the case against John A. Nance, which order the court granted, and judgment was signed accordingly. To this decision John A. Nance excepts.

While the petition of the plaintiffs alleges the imbecility of John A. Nance, the person for whose benefit plaintiffs allege the suit was brought, there is nothing in the present record sustaining this allegation. There is no proof whatever that he was incapable of making a contract, or that he was a minor, or that he desired the institution of this suit to cancel a conveyance that he had made to his brother and wife. The court, it seems, upon motion of his alleged next friends, entered a judgment against him for the costs of this suit without any proof whatever having been offered to show that they had instituted the suit for him in good faith, and that he was non compos mentis. We know of no law in Georgia that authorizes anyone, without authority from any court, to voluntarily institute a suit as next friend for an imbecile or lunatic. It has frequently occurred in the practice that such suits are instituted by persons as next friends of minors; but when the property of an insane person or imbecile, who has not sufficient capacity to manage the same, is being wasted, or when it has been seized by others ^{or} wrongfully to the injury of one in such a condition, it is evidently, under the statute, the duty of the ordinary to appoint a guardian for such imbecile or lunatic. In the event a guardian is duly appointed in this way, there can be no question about his right to institute an action in any court, whenever it becomes necessary to protect the personal or property rights of such a ward. We do not mean to say that a person could not, as next friend, without order of court, bring such an action for the protection of the rights of an irresponsible person; but we are confident that when it is done, and the next friend voluntarily dismisses his action, he has no right to ask that the court render a judgment for costs against the party for whose benefit he pretends to be acting. The general rule seems to be that in an action prosecuted by a next friend for an infant, the latter is not primarily liable for the costs of an unsuccessful suit. These costs are usually borne in the first instance by the next friend, or guardian ad litem, and this liability has been held to be the reason for the appointment of a next friend or guardian ad litem in a

case: *Harper v. Whitehead*, 33 Ga. 144 (2); 14 Ency. of Pl. & Pr. 1044, 1045. Daniell, in his work on Chancery Pleading and Practice, volume 1, pages *79-81, seems to recognize the doctrine that the liability of a next friend for the costs of dismissing a bill, or an unsuccessful proceeding instituted by him, is applicable only as between the next friend and the defendant in the cause; for the court is usually anxious to encourage those who will stand forward in the character of next friend on behalf of infants, and will, whenever it can be done, allow the next friend the costs out of the infant's estate of any proceeding instituted by him on behalf of the infant, even though unsuccessful, provided he appears to have acted bona fide for the benefit of the infant. The author states further that such an inquiry, as to whether the suit was instituted for the benefit of an incapacitated person, would not be directed on the application of a next friend, but the latter must carry it at his own risk. We know of no principle of law upon which the plaintiff in error in the present case could properly have been held by the judge to be primarily liable for the costs.

Judgment reversed.

All concurring, except Little, J., absent.

THE SUBJECT OF COSTS, in general, is discussed in the notes to *Ela v. Knox*, 88 Am. Dec. 181-185; *Saunders v. Frost*, 16 Am. Dec. 405-407. An infant is not personally chargeable with costs, where a bill filed in his behalf by a friend is dismissed or a decree is made during his infancy. In such a case, the next friend is chargeable, unless there is a fund in court belonging to the infant. The costs are not chargeable on the estate of the latter, unless it appears that the suit was brought bona fide, with the intent to benefit him: *Waring v. Crane*, 2 Paige, 79, 21 Am. Dec. 70.

HARGROVE v. TURNER.

[112 Ga. 134, 37 S. E. 89.]

ATTACHMENT—FRAUDULENT TRANSFERS.—A father may contract with his minor son to pay the latter wages for his services, and if he delivers personal property to such son in payment of his wages, the fact that the property is found in the possession of the father at a subsequent time does not render it subject to attachment as his property, since, in such case, the possession of the father is that of the son.

Rowell & Rowell, for the plaintiff.

M. B. Fubanks, for the defendant.

125 SIMMONS, C. J. For one year's work, Turner contracted to pay his minor son one hundred dollars. The son performed his part of the agreement, and at the end of the year the father, being unable to pay the son in money, purchased a horse from Moultrie and gave it to the son in satisfaction of the debt. He explained the matter fully to Moultrie at the time of the purchase of the horse. At the time of the purchase and at the time of the trial of the present case Turner was insolvent. He had for several years allowed his son to work for himself and receive the proceeds of his own labor. The father gave him his board free of charge, but required him to clothe himself. It does not appear from the record that any note or mortgage was given by Turner to Moultrie. Turner failed to pay the purchase money, and attachment was sued out by Mrs. Hargrove, who seems to have come into possession of the claim in some way not indicated in the record. The attachment proceedings were had under the Civil Code, section 4539, for the balance due on the purchase money of the horse. The horse was levied on and a claim was filed by the son by his next friend. On the trial the above facts appeared; also that the son had attained his majority some time after the filing of the claim and prior to the trial, and that the horse, at the time of the levy, was "in the possession of [the father] on his place." The case was submitted to a jury, and they returned a verdict finding the property not subject. A motion for a new trial was made by the plaintiff. It was overruled by the court and the movant excepted.

That a father may emancipate a minor child by allowing him to receive the proceeds of his labor is settled by our code and by decisions of this court. Allowing the child to receive the proceeds of his own labor amounts to an emancipation: Civ. Code, sec. 2502; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115. When, therefore, the father in this case allowed the son to receive the proceeds of his labor and made a contract with him by which he was to do farm work for a year for the father and to receive therefor an agreed compensation, this amounted to an emancipation of the son from the control of the father, and the son could have enforced the contract unless the father had revoked his consent before the performance of the work. No revocation has ever been made, and the son was, as to this contract, *sui juris*. The father was as much bound to pay the son for the year's work as though he had been an adult and a stranger. 130 When the father purchased the horse from

Moultrie he received the title thereto. When he gave the horse to his son in satisfaction of the debt he owed him, the title passed to the son. The learned counsel for the plaintiff in error did not, in his argument here, dispute any of these propositions, but planted his case upon the fact that the evidence showed that the attachment was issued for the purchase money of the horse; that Turner, the father, was in possession at the time the levy was made, and that the property was subject under section 4539 of the Civil Code, which declares that attachment may issue for the purchase money of property when the defendant is in possession. We think, however, that while the father was in possession of the horse at the time of the levy, this possession was not inconsistent with the right of the son to claim title to the horse. The son was a minor and could not legally have held possession of the property. In cases where title to personal property is in a minor, the law places the possession of it in the parent or guardian, and the possession of the parent is virtually the possession of the minor. Where the father and the minor son resided upon the same place and dwelt in the same house, and the father was in actual possession of the horse which belonged to the son, the possession of the father was that of the son and for the son's benefit. Had this been a gift from the father to the son, it would have been the duty of the father to retain possession of the property until the son arrived at majority. Had a third person given the horse to the son, it would have been the duty of the father to take possession for his son: Civ. Code. sec. 3565. "The possession of the parent, the natural guardian of his infant child, who makes a present to such child and retains the possession of the article given, is the possession of the donee, or at least such possession is not inconsistent with such donee's title. In such an instance there is no presumption of fraud. As the parent is entitled to the possession of his minor child's property, the law does not require him to make a formal delivery to the child, when he must at once repossess himself of the property given": Thornton on Gifts, sec. 175. See, also, *Dasher v. Ellis*, 102 Ga. 830, 30 S. E. 544.

In the present case it does not appear that the original vendor of the horse retained title or took any mortgage to secure the purchase money. As before remarked, Turner obtained title to the horse by the purchase. Having title, he had the right to sell the ¹³⁷ horse or to give it in satisfaction of a bona fide debt. There is in the record no intimation that there was any

collusion or fraud between the father and the son. Indeed, the evidence demonstrates that the father honestly owed the son one hundred dollars for one year's work, and gave the horse to him in payment of the indebtedness. Had Turner owed the debt to some one other than the son and given the horse in satisfaction, no one would contend that the horse was then subject to levy and sale for payment of the purchase money, even though it was found in Turner's possession. After the horse had been given by the father to the son in payment of a bona fide indebtedness, its subsequent possession by the father would not, under the rules above announced, make it subject to levy for purchase money by the original vendor. The possession of the father was not in his own right, but for the benefit of his son. There was, therefore, no error in overruling the motion for a new trial.

Judgment affirmed.

All the justices concurring, except Lumpkin, P. J., and Little, J., absent.

INFANTS' EARNINGS—PARENTS' CREDITORS.—Where a parent emancipates his minor children, his creditors cannot reach earnings thereafter acquired by such minors. And if, during their minority, they earn money which they loan to him, a conveyance by him to them in consideration thereof is made upon a valuable consideration, and will not be set aside as in fraud of creditors: *Flynn v. Balsley*, 35 Or. 268, 76 Am. St. Rep. 495, 57 Pac. 908.

CHANGE OF POSSESSION ON THE SALE OF PROPERTY BY PARENT TO CHILD.—While there are decisions in harmony with the principal case, and therefore holding that following a sale of property by one member of a family to another, and especially from a parent to a child, or a child to a parent, there need not be any open, visible, or continuous change of possession, it is believed that the weight of authority is in opposition to these decisions, and maintains that the change of possession must be sufficient to indicate a change of ownership, though the vendor and vendee are members of the same family and live in the same house: *Freeman on Executions*, 3d ed., sec. 155, p. 746; *Hart v. Mead*, 84 Cal. 244, 24 Pac. 118; *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 86 Pac. 857; *Wheeler v. Selden*, 68 Vt. 429, 25 Am. St. Rep. 771, 21 Atl. 615.

FORSYTH MANUFACTURING COMPANY v. CASTLEN.

[112 Ga. 199, 37 S. E. 485.]

SALES—PROPERTY NOT IN EXISTENCE.—While there can be no sale of an article which is not in existence, a person may legally enter into an executory contract to sell such article in future, when it comes into existence.

SALES—PROPERTY NOT IN EXISTENCE.—An executory contract for the sale of goods for future delivery is not void by reason of the fact that at its date the vendor does not have the goods, has not entered into any arrangement to buy them, and has no expectation of receiving them, except by going into the market and buying or otherwise acquiring them, unless it is the intention of both parties to the contract that the goods shall not be actually delivered, but that there shall be a settlement of the differences between them, according to the market value of the article, on a given day. In the latter event, such contract is a wager and not enforceable by either party.

CONTRACTS—SALE OF GOODS NOT IN EXISTENCE.—A contract for the future delivery of goods not then in existence is not a wagering contract, when actual delivery of the goods is contemplated by either one or both of the parties.

CONTRACTS—VALIDITY, ATTACK UPON—BURDEN OF PROOF.—If a contract is valid upon its face, or if, taken in the light of the circumstances surrounding the parties at the time it was entered into, it appears to be valid, it is incumbent upon him who attacks it to show its invalidity.

SALES—GOODS NOT IN EXISTENCE.—If a contract for the future sale of goods not then in existence is valid, the fact that the seller cannot comply with the contract in the manner in which he intended, when that mode of compliance is not made a part of the contract itself, does not prevent him from complying in some other way open to him at the time he is bound to perform.

SALES—GOODS NOT IN EXISTENCE—EVIDENCE OF INTENT.—In determining the validity of a contract for the future sale of cotton not then in existence, depending upon the intention of the parties at the time the contract is entered into, evidence is admissible to show that the seller is a cotton planter, and had cotton actually planted and growing at the time of making the contract.

CONTRACTS—PAROL EVIDENCE TO VARY.—In order to render parol evidence admissible to make complete an incomplete written contract, the fact that such contract is incomplete must appear from its face by reason of patent ambiguity, or, although apparently complete on its face, in the light of evidence showing the circumstances surrounding the parties at the time the contract was executed, a latent ambiguity is made to appear.

CONTRACTS—PAROL EVIDENCE TO VARY.—In order to permit parol evidence to be admitted to show an agreement collateral to the written contract, it must appear, either from the contract itself or from the surrounding circumstances, that the contract is incomplete, and what is sought to be shown as a collateral agreement must not in any way conflict with or contradict what is contained in the written contract.

CONTRACTS—SALE OF GOODS NOT IN EXISTENCE—EVIDENCE TO VARY.—If a written contract for the future sale of goods not then in existence, of a certain description, fails to call for the delivery of any specified or particular goods, parol evidence is not admissible to show a collateral agreement that the goods described were to be raised on the lands of the seller. In such case, the seller may deliver any goods of the class and quality described in the contract, no matter by whom made or produced.

Stone & Williamson, Persons & Persons, Bloodworth & Rutherford, and Hardeman, Davis & Turner, for the plaintiff in error.

R. L. Berner and Cabaniss & Willingham, for the defendant in error.

200 COBB, J. Castlen brought suit against the Forsyth Manufacturing Company upon a contract, of which the following is a copy: "This agreement made and entered into this the twenty-fifth day of April, 1898, by and between the Forsyth Manufacturing Company, of the first part, and A. W. Castlen of the second part, both of the county of Monroe and the state of Georgia, witnesseth: That the party of the first part hereby agrees to pay the party of the second part six cents per pound for one hundred and fifty bales of lint cotton to be delivered at the warehouse of said Forsyth Manufacturing Company on the Central Railroad just above Forsyth, in good merchantable order, at times below set forth. The party of the second part hereby agrees to deliver at the place above designated one hundred and fifty bales of lint cotton, said cotton to be delivered to the Forsyth Manufacturing Company, as follows: Fifty bales in September, fifty bales in October, and fifty bales in November, 1898, at the place above set forth, and in good merchantable order; all bales to weigh more than four hundred and fifty pounds each; and should the party of the second part fail or refuse to furnish the full amount of fifty bales each month as above set forth, then the second party forfeits one-half cent per pound for each pound not delivered at end of each month of the fifty bales." This contract was signed by both parties 201 therein mentioned. At the trial it appeared that Castlen was a cotton planter, that this fact was known to the president of the defendant company, and that at the date the contract was entered into Castlen had upon his land cotton planted and growing. It also appeared that Castlen had delivered to the defendant one hundred bales of cotton, which were raised upon his place, and which were received by the defendant and paid

for under the contract. Six bales raised on the plaintiff's place were delivered and received in due time, but have never been paid for. The plaintiff tendered to the defendant, in November, a sufficient number of bales to complete the contract; but the defendant company refused to receive and pay for these bales, on the ground that they were not raised upon the land of Castlen. This action is brought to recover for the six bales of cotton which were received and not paid for, and for damages on account of the failure to receive and pay for the number of bales tendered in November, which were necessary to complete the contract. The jury, under the charge of the court, returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which was overruled. The case is here upon a bill of exceptions assigning error upon the decision of the judge overruling a demurrer to the petition, and upon the judgment refusing to grant a new trial.

1. As a general rule, a person who owns property has the right to dispose of it to another. When the one who has the right of property is in actual possession, this right of disposition is subject to few restrictions. In order to make a complete sale of property whereby the title would pass from the seller to the buyer, it is necessary that the thing which is the subject of the sale should have an actual or potential existence at the date of the sale. It has been held that a mortgage upon a crop of cotton is valid if at the date of the mortgage the cotton be planted and growing: *Crine v. Tifts*, 65 Ga. 644; *Stephens v. Tucker*, 55 Ga. 543. See, also, *Jones v. Richardson*, 10 Met. 488; *Van Hoozer v. Cory*, 34 Barb. 9. On the other hand, it has been held that a sale of a certain number of bales of cotton of a crop of a given year, made before the seed were planted, passed no title to the vendee, for the reason that nothing can be the subject of bargain and sale which has no actual or potential existence at the date of the sale and until the crop is actually growing, or at least until the seed are planted, the crop cannot be ²⁰² said to have even a potential existence: *Noyes v. Jenkins*, 55 Ga. 586. See, also, *Redd v. Burrus*, 58 Ga. 574; *Huntington v. Chisholm*, 61 Ga. 270; *Wheeler v. Wheeler*, 2 Met. (Ky.) 474, 74 Am. Dec. 421; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. If a contract provides for the delivery by one party to another of that which is not only not in the possession of the person contracting to sell but which has no existence, either actual or potential, while the contract cannot be upheld as a sale, the parties to the same may be bound by the terms thereof as con-

stituting an executory agreement to sell. While there can be no sale of an article which is not in existence, it is legally possible for one to enter into an executory contract to sell such an article in the future when it does come into existence: 2 Kent's Commentaries, 14th ed., *468 et seq., *492, note. See, also, Newmark on Sales, sec. 68, p. 93. The right to enter into a contract for the sale of a thing which was to come into existence in the future was recognized by the civil law: 1 Domat's Civil Law, Cushing's ed., sec. 310; McKeldey's Roman Law, sec. 400. The rule of the civil law, that future things might be the subject of an obligation, was, however, subject to the exception which prohibited "dealers from buying corn or hay before the harvest, wool before the shearing, etc.," and such contracts were declared to be void: 1 Pothier on Obligations, top p. 170. The distinction between a contract for the sale of goods and an executory agreement for future delivery is clearly drawn in cases where the question arose as to whether contracts of the latter character were within the seventeenth section of the statute of frauds. It has been held that contracts for the sale of goods, wares, and merchandise are not excluded from the operation of this section of the statute merely because they are executory. And also that contracts for the sale of goods not in esse at the time, and of a peculiar character so as to be unsuited to the general market, to be made by the work and labor and with the material of the vendor at the instance of the purchaser, are not within the section: *Cason v. Cheely*, 6 Ga. 554. See, also, Benjamin on Sales, 7th Am. (Bennett's) ed., sec. 92 et seq.

The right of a person to enter into a contract to deliver property not in his possession, relying upon making a future purchase in time to fulfill his undertaking, was doubted by Lord Tenterden (then Chief Justice Abbott) in *Lorymer v. Smith*, 8 Eng. C. L. 1, where he took occasion to say that it was a mode of dealing not to be encouraged. That case involved a contract for the sale of wheat. ²⁰³ In *Bryan v. Lewis*, 21 Eng. C. L. 476, which involved a contract for the future delivery of nutmegs, where the question of the validity of such a contract was directly before the court, Lord Tenterden adhered to the opinion expressed in *Lorymer v. Smith*, 8 Eng. C. L. 1, and made a direct ruling to the effect that: "If a man sells goods to be delivered on a future day, and neither has the goods at the time nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has

contracted to deliver, he cannot maintain an action for damages for nonperformance of the contract." Mr. Tiedeman, in his work on Sales, section 302, says: "If the common-law offense of regrating were still recognized in the criminal law, all contracts for future delivery may be open to serious objection": See, also, Tiedeman on Limitation of Police Power, sec. 95; Tiedeman on State and Federal Control of Persons and Property, sec. 107. The common-law offense of regrating was defined to be: "The buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place": 4 Blackstone's Commentaries, 159. The decision in *Bryan v. Lewis*, 21 Eng. C. L. 476, was rendered in 1826, and the common-law offense of regrating was not abolished in England until 1844: 1 Bishop's New Criminal Law, sec. 518 (2). And as the court in that case, as well as in the case of *Lorymer v. Smith*, 8 Eng. C. L. 1, had under consideration a contract for the sale of an article of the character described in the definition of regrating, these decisions might be upheld upon the suggestion made by Mr. Tiedeman. But they have not been given this restricted meaning, and there is nothing in the language of the chief justice in either case which would indicate that he intended such a restricted meaning to be given it. In *Hibblewhite v. M'Morine* (decided in 1839), 5 Mees. & W. 462, it was held that: "A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract." That case involved a contract for the sale of shares of stock in a railway company. The dictum of Lord Tenterden in *Lorymer v. Smith*, 8 Eng. C. L. 1, and the ruling in *Bryan v. Lewis*, 21 Eng. C. L. 476, were both declared to be unsupported ²⁰⁴ by authority and unsound in principle. The decision in *Hibblewhite v. M'Morine*, 5 Mees. & W. 462, was cited approvingly in *Mortimer v. M'Callan*, 6 Mees. & W. *76, a case decided in 1840.

The decisions just referred to adhered to the rule which was recognized in England, that there could be a valid executory agreement for the future delivery of an article which the seller expected to procure in time to fulfill his undertaking—a rule probably derived from the civil law, and which has not been departed from in England, so far as we have been able to ascertain

after a diligent investigation, except in the two instances above referred to. This rule has been generally recognized by the American courts. Mr. Tiedeman says that: "It may be stated, as the American rule, that bona fide contracts for future delivery of goods are not invalid because at the time of the sale the vendor has not in his actual or potential possession the goods which he has agreed to sell": Tiedeman on Sales, sec. 302, p. 486. "A person may make a contract for the sale of personal property for future delivery which is not his at the time. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated": Beach on Modern Law of Contracts, sec. 1463. See, also, 14 Am. & Eng. Ency. of Law, 2d ed., 606, 607, and notes. In *Hawley v. Bibb*, 69 Ala. 52, 55, Mr. Chief Justice Brickell says: "The effect and validity of contracts for the sale and future delivery of personal property, of which the seller has not possession or ownership at the time of the sale, has been the subject of much contestation and litigation in the courts of this country and of England of recent years. Since the decision of the court of exchequer in *Hibblewhite v. M'Morine*, 5 Mees. & W. 462, departing from and overruling the opinion expressed by Lord Tenterden in *Lorymer v. Smith* (Barn. & C.), 8 Eng. C. L. 1, and in *Bryan v. Lewis*, Ryan & M. 386, 21 Eng. C. L. 467, the authorities generally have concurred that a contract for the sale of goods to be delivered at a future day is valid, though at the time the vendor has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them otherwise than by a purchase at some time before the day of delivery." In *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521, Mr. Justice Fenner, after an exhaustive examination of the English and American cases in reference to this ²⁰⁵ subject, comes to the conclusion that the true rule to be derived from these cases is that an executory contract for the sale of goods for future delivery is not invalid by reason of the fact that at its date the vendor had not the goods, and had not entered into any arrangement to buy them, and had no expectation of receiving them unless by going into the market and buying them. We think it can be safely assumed that this was the rule of force in this state when the code of 1863 was adopted. The question to be now determined is whether there is anything in the code which changes this rule. The code declares that wagering contracts cannot be enforced: Civ.

Code, sec. 3668. A contract for the future delivery of goods is not a wagering contract, when actual delivery of the goods is contemplated by either one or both of the parties: *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521. If, however, it is the intention of both parties to the contract that the goods shall not be actually delivered, but that there shall be a settlement of the differences between them, according to the market price of the article, on a given day, such a contract would be a wager and not enforceable by either party: 2 Beach on Modern Law of Contracts, sec. 1468; *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521; 14 Am. & Eng. Ency. of Law, 2d ed., 610, 611; *Alexander v. State*, 86 Ga. 246, 12 S. E. 408, and cases cited; *Walters v. Comer*, 79 Ga. 796, 5 S. E. 292; *Thompson v. Cummings*, 68 Ga. 124, and cases cited.

Section 3537 of the Civil Code declares: "A bare contingency or possibility cannot be the subject of sale, unless there exists a present right in the person selling to a future benefit. So a contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party." Was this section intended simply as a declaration of the existing law at the time the code was adopted, or was it the intention of the general assembly to alter the rule which at that time was well settled in regard to contracts for the sale of goods for future delivery? In arriving at the meaning of a section of the code, the rule to be followed is well settled, and declares that a section of the code shall not be so construed as to alter the law as it existed at the date of the adoption of the code, unless such a construction is demanded by the terms of the section, and in cases ²⁰⁶ where its language is ambiguous or of doubtful meaning that construction should be placed upon it which would keep in force the old law, rather than that which would bring into existence a new rule: See *Mitchell v. Georgia etc. Ry. Co.*, 111 Ga. 760, 36 S. E. 971, and cases cited. The first clause of the section quoted declares that a bare contingency or possibility cannot be the subject of a sale, unless there exists a present right in the person selling to a future benefit. To this extent the section simply declares what was the rule at common law, and which has been recognized in this state, that there can be no valid sale of anything which has neither an actual nor potential existence. There is nothing in

this language which is to be construed as declaring that an executory agreement for the sale of an article which had neither an actual nor potential existence would be void. The remaining portion of the section declares under what circumstances a contract for the sale of goods to be delivered at a future day would be contrary to the policy of the law and not enforceable by either party. Construing this part of the section as a whole, and in the light of the law from which it was evidently derived, the conclusion is reached that the intention of the general assembly, in adopting the section in the language in which we find it, was to keep in force the rule which was well settled at the time the code was adopted, that a contract for the sale of goods for a future delivery was valid, if both or either of the parties contemplated an actual delivery at the time the sale was made; and that in order to render invalid an executory agreement to sell an article of which the seller has neither the actual nor potential possession, it must appear that the transaction was a pure speculation upon chances and so intended by both parties. If there was skill or labor to be employed or expense to be incurred by the seller, and at the same time he intended to deliver the goods themselves, the contract would not be a pure speculation upon chances, notwithstanding both parties were aware that the seller intended to purchase in order to fulfill his undertaking. We are fully aware of the difficulty which confronts us in determining the meaning of this section, and its meaning is by no means clear; but construing the section in the light of the well-settled law of force when the code was adopted, and applying the rule of construction above referred to, we have reached the conclusion that the safer course would be to give to the section the meaning which would make it simply ²⁰⁷ declaratory of the well-settled rule of law. This construction is more satisfactory to our minds when we consider that any other construction than that above placed upon it would be to declare that the codifiers intended to change the rule of the common law and make the law of Georgia the rule laid down by Lord Tenterden, which seems never to have been followed, and which had been, at the date of the adoption of the code of 1863, expressly repudiated by both the English and American courts. Certainly, the codifiers of that code did not intend to make the law of Georgia a decision of an English judge, rendered in 1826, which was, at the time the code was adopted, uniformly declared to be unsound in principle and unsupported by precedent.

The rule of the common law in regard to contracts of this character was founded in wisdom, and commercial transactions which are permitted under it are of daily occurrence; and this is an additional reason why, in a case where the intention of the law-makers is doubtful, a construction should be placed upon the law which would not replace a wise and salutary rule of law with one which in its operation would be harmful and disastrous. In *Swift v. Powell*, 44 Ga. 123, it appeared that A agreed with B to deliver one hundred bales of cotton at twenty-one cents per pound to him at any time within sixty days, and that B knew that A expected to purchase to fulfill his contract, which was reduced to writing, and recited that it was for value received, and the parties further agreed to put up one thousand dollars each, which they did, to cover the losses of such contract. It was held that, inasmuch as the original contract was reduced to writing, and recited a consideration, there was sufficient under the facts to take the contract out of the operation of the section of the code above quoted. Mr. Chief Justice Lochrane in the opinion said: "The written instrument entered into between the parties, reciting a consideration for the agreements entered into, lifted the case, in the opinion of the court, out of the operation of the code, section 2956 [Civ. Code, sec. 3537], and gave to it the effect of a legal and binding contract, which courts would recognize and enforce." The effect of this ruling seems to be, that if there is a consideration for the contract, the section under discussion does not apply. In *Branch v. Palmer*, 65 Ga. 210, it was held that a sale of cotton for future delivery, where both parties knew that the vendor expected to purchase to fulfill his contract, and to put no skill, labor, or expense²⁰⁸ therein, but that it was a speculation on chances, would be illegal; but if the cotton was to be bought and delivered at once, and skill, labor, or expense entered into the contract, it would be valid. That decision is not directly in point in the question now under consideration, but the reasoning upon which it is founded is rather in line with the reasoning upon which the conclusion we have arrived at is based—that is, that to render the contract invalid it must appear that it was the intention of both parties that it was to be a pure speculation upon chances; and in that case the fact that the cotton was to be delivered at once, and there was skill, labor, and expense in bringing about this purchase, negatived any inference that the parties intended a speculation upon chances. In *Thompson v. Cummings*, 68 Ga. 124, and in *Warren v. Hewitt*, 45 Ga. 501, it was held that

a speculation in cotton futures, where the parties intended to settle differences on the basis of the market value of the cotton on a given day, was prohibited by the section of the code now under consideration. In *Watson v. Adams*, 103 Ga. 733, 736, 30 S. E. 577, it was held that there could be no valid sale of a legacy the vesting of which was dependent upon a bare contingency, for the reason that such a sale was rendered inoperative by the provisions of section 3537 of the Civil Code, and that no title would pass to the purchaser. A levy of an attachment issued against the legatee was consequently held to be void. In the light of the suggestion made by Mr. Tiedeman, which is referred to above, that all contracts for future delivery of goods are subject to serious question wherever the common-law offense of regrating is still punishable by indictment, it may be proper to state that while the common-law offense of regrating is an indictable offense in this state (Pen. Code, sec. 662), the article which was the subject of the contract to sell in the present case does not come within the class mentioned in the common-law definition of the offense of regrating. The Penal Code does not attempt to define the offense of regrating. It simply declares that one who shall commit the offense known to the common law as regrating may be prosecuted and punished. Mr. Bishop says: "It is not easy to see how simple regrating, as defined by Blackstone, and distinguished from forestalling and engrossing, can be a common-law offense in this country": 1 Bishop's New Criminal Law, sec. 528. While the offenses of forestalling, regrating, and engrossing were abolished in this state by the Penal ²⁰⁰ Code of 1833, they were revived by the act of December 5, 1863: See Acts 1863-64, p. 46; Cobb's Digest, 821, sec. 249.

2. The contract under consideration in this case is upon its face a valid contract. While it may be said that it is apparent from the terms of the contract that it was not the intention of the parties to sell any specific article, but that it was an executory agreement for the sale of an article which was to come into existence after the contract was entered into, still it is apparent that it was the intention of the parties that there should be an actual delivery of the article when it came into existence, and no language could have been used which would have made this intention more manifest than that provision in the contract which imposed upon the seller a penalty for every pound of cotton which he failed to deliver according to the terms of the contract. The contract is valid upon its face, and when construed in the light of the circumstances surrounding the parties at the

time it was executed, it is apparent that the parties contemplated an actual delivery of the property, and in no sense was it a mere speculation upon chances. While the contract did not call for any particular cotton, or cotton raised upon any particular place, the occupation of the seller, that of a cotton planter, was a circumstance which could be looked to, even if there was doubt about the intention of the parties, to determine whether an actual delivery of cotton was contemplated, or whether on the day fixed for delivery the two parties were to settle with each other their differences on the basis of the market value of the article on that day.

3. When a contract is valid upon its face, or, taken in the light of the circumstances surrounding the parties at the time it was entered into, it appears to be valid, it is incumbent upon him who attacks the contract to show its invalidity; and therefore in the present case the burden rested upon the defendant to show that the agreement entered into between it and the plaintiff, although apparently valid, was merely colorable; that there was no intention on the part of the parties that actual cotton was to be delivered; that the transaction was a mere speculation upon chances, and that both intended that on the day fixed for the delivery the differences between the parties should be adjusted by the payment of a sum of money by one to the other, as the case might be, according to the market value of the cotton on that day: See *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521; 2 Beach on Modern Law of Contracts, sec. 1468.

²¹⁰ 4. It is clear from the evidence in this case that it was the intention of the parties that there should be an actual delivery of cotton, and it is to be inferred from the testimony that at the time the contract was entered into both parties to the contract expected that Castlen would comply with his contract by the delivery of cotton raised on his lands. This was not, however, made a stipulation in the contract, and the fact that for some reason Castlen was unable to comply with his contract with cotton procured from this source would not prevent him from purchasing in the market cotton sufficient to comply with his contract. The contract was valid at the time it was entered into, and the fact that the seller could not comply with the same in the manner in which he intended to comply, when that mode of compliance was not made a part of the contract itself, will not prevent him from complying with his contract in such other way as may be open to him at the time he is bound to perform: See *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. Rep. 521.

5. It was contended by the defendant that the contract was a mere speculation upon chances, and void. Whether it was such depended upon the intention of the parties at the time the contract was made; and the circumstances surrounding them at the time would shed much light on this question. There was, therefore, no error in admitting testimony to show that Castlen was a cotton planter, and had cotton actually planted and growing at the time he entered into the contract.

6, 7. The Civil Code declares that parol evidence is inadmissible to add to, take from, or vary a written contract, or to contradict or vary the terms of a valid written instrument: Civ. Code, secs. 3675, 5201. When parties have reduced the agreement between them to writing, they must abide by the terms of the writing, whatever they may be, and nothing in the writing can be contradicted or varied by parol evidence. If, however, "a part of the contract only is reduced to writing (such as a note given in pursuance of a contract), and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible": Civ. Code, sec. 3675 (1). "To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential: 1. The writing must appear on inspection to be an incomplete contract; and 2. The parol evidence must be consistent with, and not contradictory of, the written instrument": Bradner on Evidence, 2d ed., 303. See, also, Underhill on Evidence, secs. 209, 307; Smith on Evidence, 214. And a party is at liberty to prove "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them": 2 Wharton on Evidence, sec. 1026, p. 203. See, also, Smith on Evidence, 553; 1 Greenleaf on Evidence, 16th ed., sec. 284a, p. 413; Browne on Parol Evidence, sec. 50; McKelvey on Evidence, sec. 277. It appears from the authorities above cited that, in order to render parol evidence admissible for the purpose of making complete an incomplete contract, the fact that the contract is incomplete must appear upon the face of the contract by reason of a patent ambiguity, or, although apparently complete on its face, in the light of evidence showing the circumstances surrounding the parties at the time the contract was executed, a latent ambiguity is made to appear. The code

recognizes this rule and allows proof of attendant and surrounding circumstances in order to relieve a patent ambiguity, and in order to raise a latent ambiguity that it may in like manner be relieved: Civ. Code, secs. 3675, 5202. The rule is thus stated in *McMahan v. Tyson*, 23 Ga. 43: "When a writing is such that something more than what is expressed by it is to be implied from it, parol evidence of anything not inconsistent with that unexpressed something is admissible." In that case it appeared that a note was given in consideration of "rent," and parol evidence was admitted to show what was the subject matter of the contract of rent. In *Johnston v. Patterson*, 86 Ga. 725, 13 S. E. 17, the ruling in *McMahan v. Tyson*, 23 Ga. 43, was followed, and it was held that a written contract, silent or ambiguous as to certain matters, may as to them be explained by parol evidence not conflicting with anything plainly expressed in such contract. In *Barclay v. Hopkins*, 59 Ga. 562, it was held: "Where the entire contract does not purport to be in writing, parol testimony is admissible to show all other terms and conditions, not inconsistent with the written part." There are many decisions by this court relating to this subject, but it would be useless to refer to or cite all of them. Enough have been cited to show that this court has recognized the rule that, in order to allow parol evidence to be admitted to show a collateral agreement it must appear, either from the contract itself ²¹² or from the surrounding circumstances, that the contract is incomplete, and what is sought to be shown as a collateral agreement must not in any way conflict with or contradict what is contained in the writing. An examination of the cases decided by this court will show, we think, that this rule has been steadfastly adhered to. There may be some confusion in regard to the way in which it has been applied in some cases, and possibly there have been erroneous applications of the rule; but no case has been called to our attention where there has been any departure from this rule.

It follows from what is above said that the court did not err in refusing to allow the defendant to prove, as a collateral agreement between himself and the plaintiff, that the cotton specified in the contract was to be raised on the lands of the plaintiff. The contract between the parties evidenced by the writing calls for a certain number of bales of cotton of a certain description, and for no particular cotton. It is clear that, so far as the terms of the contract are concerned, the parties did not intend

that the plaintiff should be limited to cotton raised by him. It was a plain and unambiguous contract for the delivery of any cotton, answering to the description specified in the contract, which the plaintiff might see fit to offer to the defendant at the times specified in the contract. Such being the legal effect of the paper, parol evidence tending to show that the real contract was that the cotton was to be raised on the land of the plaintiff contradicted and varied and altered the very terms of the written instrument. There being no patent ambiguity in the contract, of course parol evidence was not admissible on the ground that such an ambiguity might be explained. Evidence showing that it was the intention of the parties to make a contract whereby plaintiff should be confined to cotton raised on his own lands did not raise a latent ambiguity, but directly impeached an unambiguous instrument. If such evidence could be held to raise a latent ambiguity, then the rule prohibiting the introduction of parol evidence would be in effect abrogated. If such was the intention of the parties, and this was omitted from the contract by fraud, accident, or mistake, of course the defendant would have a right in a court of equity to reform the contract, but he cannot in a court of law be allowed in this manner to contradict the terms of a plain, unambiguous paper by parol evidence. Many cases were cited by counsel for plaintiff in error from the courts of this country and of England, but ²¹³ what is said in regard to the decisions of our own court will apply generally to these cases, and that is, that the rule above referred to has been recognized in perhaps all of them, but there has been some confusion in its application to the facts of the particular case. Of the many cases cited we will allude to only one, a case decided by the queen's bench division of the supreme court of judicature of England. It was held by two judges, Bramwell, L. J., dissenting, that on the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make; and that parol evidence is admissible to show such usage. Even if that be sound law, it would not be applicable in any case unless there was something peculiar about the article manufactured. Whether under the rule parol evidence would be admissible even in this case is not free from doubt. But where the article sold is a common article of merchandise or a common

product of the country, the rule laid down in that case would certainly not be applicable. The language of Bramwell, L. J., in his dissenting opinion seems to us to be a recognition of the correct rule and a true application of it to the facts of the case then under consideration. He says: "To hold that it was a part of the bargain that they should be of the vendor's make is to insert a term in the contract that the parties might have put in for themselves, and this ought never to be done without some most cogent consideration. . . . I hold, therefore, that where goods are bought which are as good when of one man's make as of another's, there is no agreement by the seller, though a maker, that the goods shall be of his make. And that this is true whether the article is already made or is to be made": *Johnson v. Raylton*, L. R. 7 Q. B. D. 438, 448.

8. There was no error in overruling the defendant's demurrer, nor in the rulings on evidence complained of in the motion for a new trial. The evidence authorized the verdict; and nothing appears in the record which authorizes a reversal of the judgment refusing a new trial.

Judgment affirmed.

All the justices concurring.

Sales of Property not then in Existence.*

The rule that property must have an actual or potential existence, in order to be the subject of an executed sale is so well settled as to have become elementary, as is also the rule that at the time of the sale the vendor must have a present disposable interest in the thing sold. Property made the subject of a sale, although not in actual existence, if it has a potential or possible existence, as the product or increase of that which is in existence, and the right to it when it shall come into existence, is a present vested right. Thus trees standing upon the ground, or all kinds of crops growing or to be grown, wool upon sheep, the future progeny of animals, and, in fact, anything which is to come into existence in the future in which the vendor has a potential ownership in the present, may be the subject of a sale. In such case, the sale is absolute and perfect when made, vesting the property in the purchaser the moment it comes into existence, or, in the language of the books, "as soon as it is extant." In all such cases, the thing sold has a potential existence, and the hopes or expectations of

REFERENCES TO MONOGRAPHIC NOTES.

Mortgages of property not in existence: 46 Am. Dec. 712-718; 76 Am. Dec. 728-738; 80 Am. Rep. 63-68.

Sales of property to be delivered in future: 1 Am. St. Rep. 752-766.

Sales and assignment of possibilities, contingencies, and expectancies: 94 Am. Dec. 649-651; 56 Am. St. Rep. 339-361.

means founded on a right in esse is the object of sale: *Van Hoozer v. Cory*, 34 Barb. 9, 12; *Low v. Pew*, 108 Mass. 347-350, 11 Am. Rep. 357; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. 807; *Heald v. Builders' Mut. Fire Ins. Co.*, 111 Mass. 38-40.

It is essential to every executed contract of sale that there should be a thing or subject matter to be contracted for, and if it appears that the subject matter of the contract was not, and could not, have been in being at the time of the contract, the sale itself is of no effect and may be disregarded by either party. The thing sold must have an actual or potential existence, but a hope or expectation of means, founded on a right in being, may be the subject of a sale, because in such case there is a potential existence. A mere possibility or contingency, not founded upon a right nor coupled with an interest, cannot be: *Wheeler v. Wheeler*, 2 Met. (Ky.) 474, 74 Am. Dec. 421. Under the rule above stated, the income or profits to be in future derived from the holding of "races" or "fairs" upon property then improved and adapted to such purposes have such a potential existence as to render them the subject of a valid executed sale: *Dargin v. Hewlitt*, 115 Ala. 510, 22 South. 128. All of the future wool grown on sheep owned by the vendor at the time of the sale may be the subject of a valid sale, vesting such wool and the title thereto in the purchaser as soon as it comes into existence: *Jones v. Richardson*, 10 Met. 481-488; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 359. Milk and butter, the expected products of a dairy to be produced in future from property then in the hands of the vendor, have such a potential existence that they may be lawfully sold, and the sale will vest the product in the purchaser the moment it comes into existence: *Van Hoozer v. Cory*, 34 Barb. 9; *McCarty v. Blevins*, 5 Yerg. 195, 26 Am. Dec. 262.

The Progeny of Animals to be born in future may be the subject of a valid sale. Thus an agreement, made for a valuable consideration, to deliver to a person the first colt or the colts which a certain mare or mares may produce vests the property in such colt or colts in the purchaser when born, for which trover may be maintained, and such sale is not void against creditors for want of delivery: *Fonville v. Casey*, 1 Murph. 389, 4 Am. Dec. 559; *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165; *Sawyer v. Gerrish*, 70 Me. 254, 35 Am. Rep. 323; *Allen v. Delano*, 55 Me. 113, 92 Am. Dec. 573; *McCarty v. Blevins*, 5 Yerg. 195, 26 Am. Dec. 262.

While the general rule is that the sale of a thing having neither an actual or potential existence is void as to creditors, a contract by a person with the owner of a mare, by which he is to take the latter, breed her, keep her until the colt is foaled and weaned, and then return her to the owner, retaining the colt as his property, for which he pays a consideration, is not within the rule; but is valid even against a creditor of the owner of the mare, who has her levied on and sold under execution while she is in foal: *Maize v. Bowman*, 93 Ky. 205, 10 S. W. 589.

Crops of all kinds, growing or thereafter to be grown, may be the subject of a valid sale. Thus the sale of a cotton crop growing, and to be thereafter grown, on the land of the vendor vests the title potentially in the purchaser from the time of the sale, and vests such title absolutely as soon as the crop actually comes into existence: *Briggs v. United States*, 143 U. S. 346, 12 Sup. Ct. Rep. 391. Or if a contract of sale and purchase relates to the fruit which shall be grown on the vendor's trees during the five years succeeding that in which the contract is made, such fruit must be regarded as having such a potential existence as will support the contract of sale: *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 21 Am. St. Rep. 63, 25 Pac. 52. It is a general rule that a person in possession of land may sell and transfer the title to crops to be grown upon the land, and the property therein will pass as soon as such crops are grown: *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429; *Sanborn v. Benedict*, 78 Ill. 309; *Hansen v. Dennison*, 7 Ill. App. 73; *Andrew v. Newcomb*, 32 N. Y. 417; *Cotten v. Willoughby*, 83 N. C. 75, 35 Am. Rep. 504; *Wilkinson v. Ketler*, 60 Ala. 435; *Lewis v. Lyman*, 22 Pick. 437-442. Such sale of annual crops, if growing, is valid without a change of possession, not only as between the parties, but also as to third persons: *Bellows v. Wells*, 86 Vt. 599; *Hopkins v. Partridge*, 71 Tex. 600, 10 S. W. 214.

It may be stated as a general rule that the owner or lessee of land may make a valid mortgage or sale of crops to be thereafter planted thereon: *McCown v. Mayer*, 65 Miss. 537, 5 South. 98; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682. Many authorities hold that in such cases the title can pass, even as to third persons, especially where possession is taken before the rights of third persons can intervene: *Rawlings v. Hunt*, 90 N. C. 270; *Watkins v. Wyatt*, 9 Baxt. 250, 40 Am. Rep. 90; *Cinderman v. Smith*, 41 Barb. 404; *Moore v. Byram*, 10 S. C. 452, 30 Am. Rep. 58; *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724; *Hurst v. Bell*, 72 Ala. 336; *Headrick v. Brattain*, 63 Ind. 438. On the other hand, there are cases which hold that until such crop is actually growing, or until the seed is planted, it has no existence, actual or potential, so that it can be sold and pass the title, and authorize a recovery in trover: *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314; *Noyes v. Jenkins*, 55 Ga. 586. So it has been held that if a crop to be thereafter raised and harvested, is sold before the seed is sown, the contract of sale is not executed, but executory merely, and the title does not pass until the grain is ready for delivery: *Welter v. Hill*, 65 Minn. 273, 68 N. W. 26; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 109, 18 Pac. 248. It has also been decided that a person furnishing seed wheat to be sown, under an agreement that he is to have twice the quantity furnished out of the crop when grown, is a purchaser, but that he gets no title until he has taken the crop into possession as against attaching creditors of the vendor: *Callender v. McLeod*, 74 Cal. 376, 16 Pac. 194. If the vendor of a crop

growing at the time does not reside upon the land, and exercises no dominion over the crop after it is sold, but the purchaser harvests it and markets it as his own, in a manner sufficient to notify the public of his ownership, and exercises such dominion over it as is usual in such cases, the crop cannot be thereafter lawfully attached as the property of the vendor: *O'Brien v. Ballou*, 116 Cal. 318, 48 Pac. 130. The sale of a growing crop is not within the statute of frauds requiring an immediate delivery and continued change of possession, as in such case the sale passes the title without any change of possession: *O'Brien v. Ballou*, 116 Cal. 318, 48 Pac. 130; and the same rule controls as to a crop thereafter to be grown: *Briggs v. United States*, 143 U. S. 346, 12 Sup. Ct. Rep. 391. In a sale of fruit not then in existence there is an implied warranty that it shall be sound and merchantable when grown and produced: *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 190, 18 Pac. 248.

Future wages to be earned under an existing contract may be sold or assigned so as to pass the title thereto immediately: *Hartley v. Taply*, 2 Gray, 565.

A sale of goods or products to be thereafter manufactured at a specified price is valid and not against public policy, and vests the title to the finished product in the purchaser as soon as manufactured and completed: *Williams v. Chapman*, 118 N. C. 943, 24 S. E. 310; *Johnson v. Hibbard*, 29 Or. 184, 54 Am. St. Rep. 787, 44 Pac. 237; *McElwee v. Metropolitan Lumber Co.*, 60 Fed. 302.

A contract for the sale and future delivery of a commodity which the seller does not then own, and which at the time has no actual existence, but which may be procured in the market at the proper time, is a valid contract, if it is the intention of the parties, or one of them, that the commodity shall actually be produced by the seller and delivered to the purchaser, and this is so, although the money may have been deposited as a margin, to secure performance of the contract, or as indemnity against loss in case of failure of either party to perform: *Sondhelm v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687; *Crawford v. Spencer*, 92 Mo. 493, 1 Am. St. Rep. 754, 4 S. W. 13; *Cockrell v. Thompson*, 85 Mo. 510; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520, 18 N. W. 443; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 800.

It is a rule in equity that so long as the thing mortgaged or sold may be identified by the description contained in the bill of sale, the contract is valid, although the thing sold may not even be in potential existence or in the potential possession of the vendor, as in equity the title will pass to the vendee as soon as the property comes into existence or into the possession of the vendor. But such contracts operate only as sales in equity, and they cannot prevail against third persons who have acquired rights in the property be-

fore possession has been acquired by the vendee and without notice of the equitable sale: *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9673; *Pennock v. Coe*, 23 How. 117; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phillips v. Winslow*, 18 B. Mon. 431, 68 Am. Dec. 729; *Pierce v. Milwaukee etc. R. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Williams v. Winsor*, 12 R. I. 9; *Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Butt v. Ellett*, 19 Wall. 544.

Possibilities and Contingencies.—It is essential to every executed contract of sale that there should be a thing or subject matter to be contracted for. Hence, mere possibilities or contingencies, not founded upon a right, or coupled with an interest, cannot be the subject of a present sale, though it may often be of an executory contract to sell. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of the rule allowing a valid sale of such potential interest. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it comes into existence, is a present vested right, and the sale thereof is valid; otherwise it is not: *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357; *Cooper v. Caleb*, 1 Tex. App. Civ. 499; *Bates v. Smith*, 83 Mich. 347, 47 N. W. 674; *Wheeler v. Wheeler*, 2 Met. (Ky.) 474, 74 Am. Dec. 421; *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 640; *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711.

Under this rule, a sale of fish thereafter to be caught passes no title to the fish when caught: *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. The sale of accounts to be made in the practice of medicine in certain specified years thereafter by a physician does not convey to the purchaser such title or interest in the accounts when created as will enable him to maintain an action therefor: *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646. Future wages, to be earned under a contract not existing at the time, are not the subject of a valid sale or assignment: *Herbert v. Bronson*, 125 Mass. 475. It has been held that a sale of a crop of hay to be grown for an indefinite period of time in the future, upon the land of the vendor is inoperative, and conveys no title as against a bona fide purchaser of a year's crop, after it has been harvested: *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314. In all cases where the subject matter has neither an actual or potential existence, the agreement to sell is usually denominated an executory contract of sale, and for its violation the remedy of the party injured is by an action to recover damages: *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249; *Purcell v. Mather*, 35 Ala. 570, 76 Am. Dec. 307; *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711.

STUCKEY v. WATKINS.

[112 Ga. 268, 37 S. E. 401.]

COURTS OF ORDINARY — JURISDICTION — PRESUMPTION IN FAVOR OF JUDGMENTS OF.—A court of ordinary is a court of general jurisdiction, so far as matters relating to the estates of decedents are concerned, and has power to authorize the sale of property of a decedent for the purpose of paying debts or of distribution, and, when it renders a judgment, it is to be presumed that it had before it all the facts necessary to make such judgment valid and binding.

ESTATES OF DECEDENTS—SALE OF PROPERTY TO PAY DEBTS—PRESUMPTION.—It is presumed in favor of the judgment of a court of ordinary, authorizing the sale of property of a decedent to pay debts, that there are debts due by the estate of the decedent, and that the property ordered to be sold is in law subject to the payment of such debts.

ESTATES OF DECEDENTS—PROBATE SALE OF HOMESTEAD—PRESUMPTIONS—BINDING EFFECT OF JUDGMENT. It is presumed in favor of a judgment of a court of ordinary ordering property of the decedent to be sold to pay debts, which property was, during the lifetime of the decedent, set apart to him as a homestead, that the court issued the order authorizing such sale for the reason that it was made to appear that there were debts due by the deceased which were superior to the homestead right, and such judgment is binding upon all parties and their privies until reversed or set aside in the manner prescribed by law.

J. K. Hines and Chappell & Baker, for the plaintiff in error.

A. F. Daley, F. G. Corker, and W. R. Daley, for the defendant in error.

²⁶⁸ COBB, J. In 1869 a homestead was set apart to the head of a family under the laws passed in pursuance of the provisions of the constitution of 1868 with reference to homesteads. In 1874 the administrator ²⁶⁹ of the estate of the head of the family obtained an order of the court of ordinary authorizing the sale of the realty which had been set apart as a homestead, and under this order the property was sold. The validity of this order is attacked in the present case, and it is contended that, under the terms of the paragraph of the constitution of 1868 which authorizes the setting apart of property as a homestead, the order is absolutely void. That paragraph provides that "no court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart—including such improvements as may be made thereon from time to time—except for taxes, money borrowed and expended in the improve-

ment of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of encumbrances thereon": Const. 1868, art. 7, par. 1; Code 1873, sec. 5135. Under the very terms of this provision it was lawful to sell the homestead for six specified classes of debts incurred by the head of the family, and in addition to this it was lawful to sell the homestead for the payment of any debt which was incurred by the head of the family before the constitution of 1868 went into effect: *Gunn v. Barry*, 15 Wall. 610, reversing *Gunn v. Barry*, 44 Ga. 351; *Jones v. Thomas*, 48 Ga. 593; *Chambliss v. Jordan*, 50 Ga. 81; *Grant v. Cosby*, 51 Ga. 460; *Wofford v. Gaines*, 53 Ga. 485. The court of ordinary is a court of general jurisdiction so far as matters relating to the estates of decedents are concerned: *Bush v. Lindsey*, 24 Ga. 245, 71 Am. Dec. 117; *Langmade v. Hamilton*, 89 Ga. 441, 15 S. E. 535; *Dunagan v. Stadler*, 101 Ga. 474, 29 S. E. 440. It has the power to authorize the sale of property of a decedent for the purpose of paying debts or for distribution: Civ. Code, sec. 4232 (4). When this court renders a judgment, it is to be presumed, at least until the contrary is shown, that it had before it all the facts necessary to make the judgment valid and binding. This being true, when this court enters a judgment declaring that certain property of a decedent shall be sold, it is to be presumed that the sale was ordered for some purpose authorized by law: *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407; *Davie v. McDaniel*, 47 Ga. 195; *Barnes v. Underwood*, 54 Ga. 87; *Davis v. Howard*, 56 Ga. 430; *Bailey v. Ross*, 68 Ga. 735; *Roberts v. Martin*, 70 Ga. 196; *Dixon v. Rogers*, 110 Ga. 510, 35 S. E. 781. This being true, when an order of sale is passed for the purpose of distribution, there is a presumption ²⁷⁰ that there is no legal obstacle which would prevent the property from being treated as property of the decedent in the hands of the administrator to be administered; and when there is an order authorizing the sale of the property for the purpose of paying debts, there is also a presumption that there are debts due by the estate of the decedent, and that the property ordered to be sold is in law subject to the payment of these debts. So that when it appears that the property ordered to be sold has been, during the lifetime of the decedent, set apart to him as a homestead, there is a presumption that the ordinary passed the order authorizing the sale, for the reason that it was made to appear to him that there were debts due by the deceased which were superior to the homestead right.

The judgment so rendered is a judgment of a court of competent jurisdiction, and is binding upon all parties to the same and their privies until reversed or set aside in the manner prescribed by law. While the terms of the constitution are very broad, they are not broad enough to authorize a holding that when a court of competent jurisdiction has before it the question as to whether property set apart as a homestead is subject or not subject to a debt claimed in the proceeding to be one which the law says shall be superior to the homestead, and has before it the proper parties to such a controversy, a judgment so rendered will not be binding upon the parties to the case and their privies. See, in this connection, *Wegman Piano Co. v. Irvine*, 107 Ga. 65, 73 Am. St. Rep. 107, 32 S. E. 898.

Judgment reversed.

All the justices concurring, except Lewis, J., absent.

PROBATE COURT—JURISDICTION.—A court of ordinary is a court of general jurisdiction: *Bush v. Lindsey*, 24 Ga. 245, 71 Am. Dec. 117; and an order therefrom directing the sale of real estate of a decedent imports, legally, a necessity for such sale: *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407. The orders and judgments of probate courts are entitled to the same favorable presumptions and the same immunity from collateral attack as are accorded those of courts of general jurisdiction: *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399, 16 S. W. 938; *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183, 12 S. W. 703. Compare *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394, 34 Atl. 68.

HOMESTEAD.—IN GEORGIA, A JUDGMENT against the head of a family in a suit relating to the homestead binds the beneficiaries as well as himself, and is conclusive as to all of them: *Wegman Piano Co. v. Irvine*, 107 Ga. 65, 73 Am. St. Rep. 109, 32 S. E. 898.

HOMESTEAD.—AN ORDER OF A PROBATE COURT directing the sale of the homestead of a decedent is void if made during the minority of his children, or while his widow is unmarried and has not abandoned the homestead nor acquired another: *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 523.

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SMALL v. SLOCUMB.

[112 Ga. 279, 37 S. E. 481.]

VENDOR AND PURCHASER—INJUNCTION AGAINST TIMBER CUTTING.—A vendor of land who retains title thereto as security for the purchase money cannot enjoin the vendee from clearing the land and cutting the timber thereon, unless the value of the land is thereby impaired.

REVENUE STAMPS—EVIDENCE.—Congress has power to impose stamp duties and to prescribe penalties for their nonpayment, and to provide that certain instruments, unless stamped, shall not be admissible as evidence in the courts of the United States.

EVIDENCE—RULES OF.—CONGRESS HAS NO POWER to prescribe rules of evidence for a state court. Hence, it has no power to declare that certain written instruments not bearing internal revenue stamps shall not be received in evidence in any court. Such declaration can apply to courts of the United States alone, and not to state courts.

Hall & Wimberly and Dessau, Harris & Harris, for the plaintiffs.

G. S. Jones, Hardeman, Davis & Turner, and Hardeman & Moore, for the defendants.

²⁷⁹ **SIMMONS, C. J.** It appears from the record that Small and Lowe brought an action of ejectment against Mrs. Pottle. On October 17, 1898, a consent decree was entered into by the parties, whereby the plaintiffs were recognized as the owners of the land, and wherein it was provided that Mrs. Pottle should have the right to redeem the land by paying to the plaintiffs, within five years from the date of the decree, the sum of six thousand one hundred dollars principal, with interest thereon at eight per cent per annum to the time of payment, the interest being payable annually. The details of this consent decree need not be mentioned here, save to say that it contained the following clause: "It being the purpose of this agreement that said decree shall operate as a bond for title from the plaintiffs to the defendant, the plaintiffs having agreed to sell said property to the defendant under the terms hereinabove set forth." On October 19, 1899, Mrs. Pottle executed a lease of the land to Mrs. Slocumb for the period of ten years, commencing January 1, 1900. By this lease Mrs. Slocumb bound herself to pay a rental of six hundred and fifty-eight dollars per annum, out of which ²⁸⁰ was to be paid to Small and Lowe a sum sufficient to cover the interest annually becoming due to

them from Mrs. Pottle. Mrs. Slocumb was by this lease given the privilege of paying off the principal debt of six thousand one hundred dollars and taking the rights of Small and Lowe in the premises, except that Mrs. Pottle should have the right to redeem the land at the expiration of the lease, and not before. Mrs. Slocumb undertook, by the terms of the lease, to build tenant houses on the place, and was given the privilege and right of cutting and sawing the timber except on certain specified portions of the land, for the purpose of sale or otherwise. Mrs. Slocumb entered upon the place, and was proceeding to cut some of the timber and clear up a part of the land, when Small and certain persons who claimed under Lowe filed against Mrs. Slocumb and her husband and the administrator of Mrs. Pottle a petition for injunction, on the ground that the defendants were committing waste, and that the cutting of the timber would depreciate the plaintiffs' security. Both plaintiffs and defendants read before the trial judge a great many affidavits on the question as to whether there had been any waste or any depreciation of the value of the property, and as to whether any such waste or depreciation would result from the acts sought to be enjoined. It is unnecessary to set out these affidavits, either literally or in substance, further than to say that they were conflicting, and that the judge was authorized by the evidence before him to find either that the acts complained of would depreciate the value of the property or that they would result in an increase in its value. He refused the injunction, and the plaintiffs excepted.

1, 2. Under the consent decree above mentioned, the relation of vendor and vendee was established between the creditors and Mrs. Pottle. The results were the same as though the former had sold the land to the latter, reserving title in themselves to secure the payment of the purchase money and giving bond for titles binding them to convey when the purchase money, with the agreed interest thereon, was paid. They sustained the same relation to each other, on the question of security, as mortgagee and mortgagor: *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146. Mrs. Pottle had the right to transfer her bond for titles to Mrs. Slocumb, or to lease the land to her for a term of years. Mrs. Slocumb, as to the use of the land during this lease, stood in the shoes of Mrs. Pottle. Practically the only real interest that the plaintiffs had in the land was ²⁸¹ its value to them as security for the payment of the purchase money. When that is paid, then, under the decree,

they will be compelled to make title to Mrs. Pottle, her personal representative, or assigns. If Mrs. Pottle or Mrs. Slocumb do not by their acts lessen the value of the land in such manner as to make it insufficient fully to secure the plaintiffs, we think the latter cannot complain. Certainly, they cannot complain if the value of the land is not at all impaired, or if it will be worth more cleared than before the timber was cut. To cut timber and clear land so as to make arable what was before woodland is not, in this state, waste unless the value of the land is thereby impaired. The judge found on sufficient evidence that the value of the land here involved would not be lessened by the acts complained of, and we cannot say that he erred in so finding, nor interfere with his discretion in refusing the injunction sought by the plaintiffs.

3. On the trial of the case the defendants tendered in evidence the lease executed to Mrs. Slocumb by Mrs. Pottle. This was objected to by the plaintiffs, on the ground that it had not been stamped as required by the internal revenue act of Congress of 1898. It appeared that the lease had no stamp upon it. The judge overruled the objection and admitted the lease in evidence. The plaintiffs excepted and assigned this ruling as error.

We fully recognize the power of Congress to levy and collect taxes for the support of the government. We fully recognize its power to do this by the imposition of stamp duties, and to prescribe penalties for their nonpayment. We also recognize its power to regulate the practice and procedure, and to provide rules of evidence in courts established under the constitution of the United States. After much reflection and a careful and thorough investigation of cases in the courts of other states, we have come to the conclusion, however, that Congress has no power to prescribe rules of evidence for a state court. Under our system of government, the states retained all powers of sovereignty which were not granted to the general government by the constitution. They had the power to create and establish their own courts, and to regulate the practice and procedure, and to prescribe rules of evidence therein. There is nothing in the constitution of the United States which expressly or by implication gives to Congress the power to prescribe rules of evidence for the courts of the states. Of course ²⁸² Congress having the power to impose stamp duties, has the power to provide for the enforcement of their payment by any necessary and proper means. But while to make unstamped instruments

inadmissible in evidence in state courts would doubtless aid in compelling the payment of the tax, we think that such a method of collection is neither necessary nor proper, and is, therefore, not within the power of Congress. The act of 1898 subjects to a penalty anyone who fails or refuses to comply with the provisions as to stamping written instruments, and the federal courts have ample machinery for the enforcement of this penalty. No other method of enforcement would seem to be necessary, but even if it were, Congress has power to provide that no unstamped instrument shall be received in evidence in any of the federal courts. An attempt to extend this provision so as to make it applicable to the courts of the several states cannot, therefore, be defended upon the ground that it is necessary. Nor do we think it a proper means of enforcing the stamp act to interfere with courts peculiarly within the control of the several states, by declaring what shall or shall not be used as evidence in them, or to seek to make the state courts punish a failure to comply with the federal stamp act by refusing to allow unstamped documents to be used as evidence in them.

This, however, is no new question. It has been dealt with by the courts of many of the states. We have searched diligently in the reports of the decisions of the various state courts, and have found but one state court of last resort which has made and adhered to a decision that Congress had the right to prescribe that an unstamped instrument should not be received in evidence in a state court. This was in the case of *Chartiers etc. Co. v. McNamara*, 72 Pa. St. 278, 13 Am. Rep. 673, dealing with an act of Congress which provided that certain written instruments should not be received or used as evidence in any court until properly stamped. Even in that case the court did not hold generally that Congress could prescribe rules of evidence for state courts, but that it had power to provide, as it was said to have done in the act then under discussion, for "a disqualification attached to the [unstamped] document, making it incompetent to fulfill its purpose as an instrument of evidence, until the stamp duty is paid." We must confess that we are unable to see the distinction thus sought to be drawn. The instrument may ²⁸³ be perfectly legal and admissible in evidence in the state court, and yet, if it lacks the revenue stamp, Congress can say to the state court: "This instrument is disqualified, is incompetent to fulfill its purpose as an instrument of evidence, and must not be

admitted or received in evidence by you"; and this, according to the case just cited, would not be prescribing a rule of evidence for the state court. Two of the five justices, Thompson, C. J., and Sharswood, J., dissented. Nor are the reasons given for this decision at all satisfactory to our minds. It is based on the supposed necessity for such a provision in order to enforce the stamp tax, and we think that no necessity therefor existed. All other state courts which have dealt directly with this question hold, so far as we have been able to ascertain, either that Congress has no power to enact that certain documents shall be incompetent as evidence in a state court, or else, without deciding what power Congress has in the matter, that the act of Congress does not apply to the state courts but to the federal courts only. Most of those decisions were made in cases arising under the acts of 1864, 1865, and 1866, but the act of 1898 is, with respect to the questions here discussed, substantially a copy of the former acts, and the reasoning of those decisions is in every way applicable here.

In the cases of *Clemens v. Conrad*, 19 Mich. 170, and *Sammons v. Hallway*, 21 Mich. 162, 4 Am. Rep. 465, Judge Cooley, the great expounder of constitutional law in this country, shows by his reasoning that Congress has no power to prescribe such a rule of evidence for state courts, and that the act should, therefore, be construed as intended to apply to federal courts only. In the former case he said, in part: "To make an instrument inadmissible in evidence because not sufficiently stamped is, however, quite a different thing from imposing penalties for a breach of the revenue laws. The latter punishes the guilty party or compels him to perform his duty to the government; the former imposes what may be sometimes equivalent to a forfeiture of rights upon any party, guilty or innocent, who chances to be so circumstanced that he cannot make a showing of his rights in court without the production of the unstamped instrument. . . . A law so highly penal, it is to be presumed, has been so framed as clearly to point out all the cases to which it was designed to apply, so as to leave nothing to inference. In attempting properly to construe it, it is proper to bear in mind the position of the ²⁸⁴ body which enacted it, relatively to the different legal tribunals of the country. Congress creates the courts which operate within the sphere of federal sovereignty and administer the judicial power conferred by the constitution of the United States. For them it prescribes rules of evidence and may establish a course of practice. It has

no such general power as regards the state courts. Those courts have another origin, and their rules of evidence and courses of proceeding are prescribed by a different legislative body. Waiving, in the present case, any discussion of the question whether the state courts are not agencies of state government which are beyond the sphere of the taxing power of the nation and fully at liberty to investigate in their own modes, under the laws of the state, the questions of fact which are put in issue before them, we think it a just and reasonable interpretation of the law of Congress that the courts which are precluded from receiving unstamped instruments in evidence are only the federal courts. . . . We think that a rule of evidence laid down in general terms is to be understood as applicable to those courts only for which the legislature prescribing it has general power to make rules, and not to other courts, not expressly named, over which it has no such general power and with whose proceedings it could interfere, if at all, only in exceptional cases": See, also, Cooley's Constitutional Limitations, 6th ed., 592, and note.

In the case of *Latham v. Smith*, 45 Ill. 29, it was decided, Mr. Chief Justice Breese delivering the opinion, that "no power exists in the Congress to declare by law what shall or shall not be evidence in a state court." And in the case of *Craig v. Dimock*, 47 Ill. 308, the same eminent jurist said: "To hold that Congress, in the exercise of the taxing power, can enter into these [state] courts and prescribe what shall be evidence therein, is so revolting to all our notions of federal and state power as to compel us to refuse to yield any acquiescence in such a doctrine. By admitting it, the power and sovereignty of the states over legitimate subjects of state power and sovereignty are at once annihilated. We will not deny the power of Congress to require such instruments to be stamped, nor the consequent power to punish by fine an intentional evasion of the law. By conceding this, we yield all that is necessary to enable the government to carry into full effect the taxing power, and at the same time sustain and uphold in its utmost limit the exclusive power of the state to say what shall be evidence in ²⁸⁵ her own courts of justice, in a domestic transaction, wholly unconnected in every respect with the general government. It is not questioned that the Congress has power to prescribe rules of evidence and specify what shall be instruments of evidence in the federal courts, but is powerless to prescribe them for the state tribunals, as we think. Since the

act, then, does not in terms prescribe such rules to state courts, we must conclude that the provisions of the act were only intended to apply to the federal tribunals. We will not, by implication, hold that the intention of the Congress was to invade the jurisdiction of the states in the administration of justice between their citizens." These rulings were followed in the cases of *Bunker v. Green*, 48 Ill. 243, *United States Express Co. v. Haines*, 48 Ill. 248, *Hanford v. Obrecht*, 49 Ill. 146, and *Bowen v. Byrne*, 55 Ill. 467. In the case of *Wallace v. Cravens*, 34 Ind. 534, it was held: "The Congress of the United States cannot control the rights of parties in the introduction or the weight of evidence in a state court, in a case which arises purely under the laws of the state and is properly before such court, against the laws of the state." In the case of *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617, it was said: "The act, however, does not in terms extend to proceedings had under the laws of the state, and does not, on its face, import any interference with those laws. Upon the settled rules of interpretation it must be construed to embrace only proceedings had and acts done in public offices and courts established under the constitution of the United States and by authority of acts of Congress framed in pursuance thereof. But if the act of Congress under consideration had in terms embraced the state courts within its provisions, and had enacted that upon a trial in one of those courts a contract or other instrument of evidence, otherwise admissible; should not be admitted in evidence except upon compliance with its provisions, it would be our duty to declare its provisions in that respect null and void. Congress has no constitutional authority to legislate concerning the rules of evidence administered in the courts of this state nor to affix conditions or limitations upon which those rules are to be applied and enforced; nor can it rightfully convert those courts into tax gatherers for the benefit of the federal government, nor charge them with the duty of inquiring whether or not the revenue laws of the United States have been observed, ²⁸⁴ or of investigating into the motives of parties in omitting to affix revenue stamps to the contracts they may have made."

In the case of *Pargoud v. Richardson*, 30 La. Ann. 1286, Manning, C. J., delivering the unanimous opinion of the supreme court of Louisiana, said: "Since *Maurin v. Martinez*, 5 Mart. 436, it has not been doubted that the provisions of the federal constitution relative to juries refer only to trials in the federal

courts, and do not apply to the state tribunals. And earlier than then it was held that the amendment to the federal constitution, which requires the intervention of a grand jury, relates only to crimes cognizable by the United States and to criminal proceedings in its courts: *Territory v. Hatick*, 2 Mart. 88. When, then, the Congress prohibits a court from receiving in evidence any unstamped note or mortgage, we must assume that it has reference alone to the United States courts, as its prohibition is only obligatory upon them. It is said, however, that nothing is left to inference, since the act of Congress declares that these unstamped instruments are void. . . . It is not needful for us to consider this act in any other aspect than its attempt to impose rules upon the state courts as to the admission of evidence. It is not within the province of Congress to enact rules regulating the competency of evidence upon the trial of causes in a state court. The power to lay taxes is undoubted, but it is not broad enough to include the authority to declare that a written instrument of any kind shall not be received as evidence in a state court unless it is stamped. That is a restriction which appertains alone to the legislative authority of the state. In domestic transactions, in no manner connected with the general government, the state has the exclusive power to establish the rules of evidence in her own courts." This was followed and unqualifiedly approved in the case of *Holt v. Liquidators*, 33 La. Ann. 673. To the same effect, see *Hunter v. Cobb*, 1 Bush, 239; *Sporrer v. Eifler*, 1 Heisk. 633; *People v. Gates*, 43 N. Y. 40, as explained in *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466; *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *More v. Clymer*, 12 Mo. App. 11; *Forcheimer v. Holly*, 14 Fla. 239 (5); *Hale v. Wilkinson*, 21 Gratt. 75; *Crews v. Farmers' Bank*, 31 Gratt. 348; *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732. A number of state courts have held, without passing upon the power of Congress to provide that unstamped instruments shall not be received in evidence in state courts, that the act did not in fact apply to any but federal ²⁸⁷ courts: See *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Morse*, 97 Mass. 458; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Griffin v. Ranney*, 35 Conn. 239; *Haight v. Grist*, 64 N. C. 739; *Weltner v. Riggs*, 3 W. Va. 445. We have also found two cases decided by state courts of last resort since the act of 1898 went into effect. In the case of *Knox v. Rossi*, 57 Pac. 179, the supreme court of Nevada held

that state courts are not within the provisions of the act of 1898 as to the admissibility of unstamped documents in evidence. Prior decisions of the court under former acts, apparently holding to the contrary, were explained as having been made without passing directly upon the question of the applicability of the act to state courts. In the recent case of *Cassidy v. St. Germain*, 46 Atl. 35, the supreme court of Rhode Island held the act of 1898 to be applicable to federal courts only, and not to state courts.

According to the note in volume 48 of the *Lawyer's Reports Annotated*, 305, "it has been held that the provision of the act of 1898, excluding unstamped instruments from evidence, does not apply to the state courts," in the cases of *Loring v. Chase*, 26 Misc. Rep. 318; 56 N. Y. Supp. 312; *People v. Fromme*, 35 App. Div. 459; 54 N. Y. Supp. 833; *Gregory v. Hitchcock Pub. Co.*, 31 Misc. Rep. 173; 63 N. Y. Supp. 975.

There are other cases to be found in the reports where the construction of the acts was under consideration, but where no question was made as to the applicability of the acts of Congress to state courts or as to the power of Congress in this regard. Among these are the cases of *Green v. Lowry*, 38 Ga. 548; *Alexander v. Lieth*, 39 Ga. 180; *Hoops v. Atkins*, 41 Ga. 109; *Kile v. Johnson*, 48 Ga. 189; as are also such Alabama, Texas, and Wisconsin cases upon the subject as we have been able to find. These cases are not authority on the question as to whether the stamp act of Congress applies to state courts or only to federal courts, or as to whether it is within the power of Congress to make such an act applicable to state courts. These questions were not made and were not decided. Had the questions been raised, the results of those cases might have been entirely different. Those of the cases which decided that an unstamped instrument was inadmissible in evidence only where the failure to stamp was with intent to evade the act were said by Manning, C. J., in *Pargoud v. Richardson*, 30 La. Ann. 1286, to hold "not a safe or certain doctrine, . . . but one born of ²⁸⁸ a wish to recognize a doubtful power and at the same time to restrict it within such limits that its exercise would not impinge the authority of the state." In Colorado the stamp laws were held to be applicable to the Colorado courts, because Colorado was not a state, but a territory of the United States. For collections of cases upon this and kindred subjects, see *Ash on Internal Revenue Laws*, 373 et seq., 381 et seq.; *Gould & Savary's War Revenue Law of 1898*, 31, 43 et seq., 80; *Gould*

& Tucker's Notes on the Revised Statutes of the United States, 695; 7 Alb. L. J. 49; notes to Knox v. Rossi, 57 Pac. 179, 48 L. R. Ann. 305. On the whole, we have no hesitation in ruling as we do, for we are satisfied that our ruling is right in principle, and supported by the very decided weight of authority.

Judgment affirmed.

All the justices concurring.

WASTE, ENJOINING.—A VENDEE in possession under an executory contract for the sale of land in which the vendor retains the title may be enjoined from committing waste by cutting timber, in the absence of a condition permitting it, when the vendor has no other security but the land, and the value thereof is impaired: *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146.

EVIDENCE.—UNSTAMPED INSTRUMENTS may be received in evidence in state courts, notwithstanding the act of Congress of June 30, 1864, wherein it is provided that such instruments shall not be "admitted or used as evidence in any court": *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; note to *Moore v. Moore*, 7 Am. Rep. 468, 469. That act applies only to the federal courts: *Green v. Holway*, 101 Mass. 243, 8 Am. Rep. 339. This rule is believed to be equally applicable to the act now in force: *Knox v. Rossi* (Nev.), 57 Pac. 179; *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242; *People v. Fromme*, 85 App. Div. 459, 54 N. Y. Supp. 833; *Gregory v. Hitchcock etc. Co.*, 63 N. Y. App. 975, 81 Misc. Rep. 173; *Cassidy v. St. Germain* (R. I.), 46 Atl. 35.

WEST v. EQUITABLE MORTGAGE COMPANY.

[112 Ga. 377, 37 S. E. 357.]

USURY—COMMISSIONS.—If an agent to negotiate a loan agrees with the lender to deposit with him, out of commissions to be paid by the borrower, a certain percentage of the amount loaned, as a guaranty of his payment, this does not constitute such agent the agent of the lender nor make the loan usurious, although the latter charges and receives the maximum legal rate of interest on the loan.

USURY—COMMISSIONS.—If an agent to negotiate a loan is a corporation, in which the lender owns stock, the fact that, in addition to receiving the lawful rate of interest for the money loaned, he also shares as a stockholder in the commissions paid for obtaining the loan does not make the loan usurious.

J. Davison, for the plaintiff in error.

Payne & Tye and J. B. Park, Jr., for the defendant in error.

³⁷⁷ SIMMONS, C. J. West, through his agent Weaver, made application to the Atlanta Trust and Banking Company, hereinafter called the Atlanta company, a Georgia corporation, to negotiate for him a loan which was to be secured by a deed to certain land. For this he agreed to pay the Atlanta company a commission of \$270. The Atlanta company submitted the application to the Equitable Mortgage Company, a corporation of Missouri. The latter company accepted the security and made the loan, taking West's promissory notes for \$1,612.50, maturing in five years, bearing interest at six per cent per annum, and secured by deed to the land. West failed to pay these notes, and suit was brought thereon by the mortgage company. West defended by pleading usury. On the trial the judge directed a verdict in favor of the plaintiff, and the defendant made a motion for a new trial. This motion was overruled and he ³⁷⁸ excepted. The evidence showed that Weaver, West's agent, had actually received but \$1,342.50, and that West had received but about \$1,320 of the money loaned; that the mortgage company, regarding the loan as of \$1,500, added thereto \$112.50 and took the five year notes bearing interest at six per cent per annum; that it also retained three per cent of the amount loaned, or \$45, as part of a guaranty fund, belonging to the Atlanta company, to secure in part the payment of the loan; that the mortgage company paid the Atlanta company five per cent per annum as interest on the money thus retained, and agreed to return it to the Atlanta company in the event it was not required to make good losses on loans made by the mortgage company through the Atlanta company; and that West had agreed to pay the Atlanta company \$270 for its services in procuring the loan. It further appeared that the Atlanta company had been capitalized at \$50,000, and allowed by its charter to negotiate loans; that subsequently the legislature had amended its charter by authorizing it to increase its capital stock to \$100,000, and to do a general banking business; and that the mortgage company had bought up the additional \$50,000 of stock, and had thus become a large stockholder in the Atlanta company. Loans of the character of the one here involved, made by this mortgage company, except in so far as concerns the three per cent deposit and the ownership of stock in the Atlanta company, have on previous occasions been before this court, and it has already been decided that such a loan is not usurious, unless, indeed, it is made so by the deposit of the guaranty fund or by the ownership of stock by the lender in

the Atlanta company: See *Green v. Equitable Mortgage Co.*, 107 Ga. 536, 33 S. E. 869. Thus the present case presents two questions, both new to this court, which are the only questions argued here.

1. Did the deposit of three per cent of the loan with the mortgage company by the Atlanta company, as a fund to guarantee the payment of the loan, make the Atlanta company the agent of the mortgage company so as to make the loan usurious? Did the making of such deposit show usury in any other way? We think not. The mortgage company made its loan and contracted for a certain amount, not exceeding the lawful rate of interest, for the use of its money. More than this, it did not receive or contract for, for the three per cent did not in any sense become its property. That deposit remained the property of the Atlanta company, and ³⁷⁹ that company was paid interest therefor by the mortgage company. In the event that the deposit was needed to reimburse the mortgage company for losses on loans made through the Atlanta company, the deposit was to be so used; otherwise it was to remain the property of the Atlanta company and to be ultimately returned to that company. With this arrangement the borrower could have no concern, nor was the lender benefited by it save in so far as it afforded additional security for the loan. The lender did not participate in the commissions of the intermediary, but merely required this deposit of money, belonging to the intermediary, as protection against loss. This might very well have served not only to strengthen the security of the mortgage company, but to make the Atlanta company more careful in investigating applications for loans. And the Atlanta company might very well have been willing to make such a deposit, in order to establish and maintain business credit with the mortgage company, and to secure without delay loans for its own customers. On the facts above recited, we do not see how the Atlanta company could be considered the agent of the mortgage company. West agreed to pay the Atlanta company \$270 for securing the loan. So far as appears, he received the amount of the loan applied for, less this commission to the Atlanta company. Having agreed that this intermediary should retain such an amount, it was no concern of his what contract the two companies made with each other as to this amount, so the mortgage company did not receive for the use of its money more than the lawful rate of interest. This it did not do by adding \$112.50 to the amount loaned and contracting for six per cent per annum thereon. Had

the Atlanta company agreed to make a deposit of half or even all of its commission, it would have been no concern of West. The Atlanta company might even have guaranteed the full payment of the loan, principal and interest, as was done in the transaction dealt with in *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329. It was simply a business transaction between the two companies, dealing at arm's length. So long as it did not result in the lender's receiving for the use of its money more than the lawful rate of interest, it did not infect the loan with usury.

2. Does the fact that the mortgage company became a stockholder in the Atlanta company, coupled with the further fact that the Atlanta company received commissions for making this loan, in ³⁸⁰ which commissions the mortgage company, as a stockholder, shared, infect the loan with usury? In other words, the commission received by the Atlanta company having gone into the business of the company, and the mortgage company having been, as a stockholder, benefited thereby in addition to receiving the lawful rate of interest on the loan, was the transaction usurious? We think not. A corporation, duly chartered, is a legal entity. It is separate and distinct from its stockholders. If it charges usury on loans, it alone incurs the penalty provided by law. If it collects usurious amounts of interest and declares and pays dividends, a stockholder receiving such dividends is not liable to the borrower. The stockholder is no more concerned than a creditor whose debt has been paid by an individual who had charged and collected usury on loans. Certainly, the creditor would not be liable for the usury paid. These views are ³⁸⁰so well expressed by Lewis, president of the supreme court of appeals in Virginia, in the case of *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329, that we content ourselves with extracting a portion of his opinion in that case and adopting it as our own. In that case the lender was a director and large stockholder in the company which, upon the application of the borrower, negotiated the loan. The intermediary company had charged the borrower a commission of \$1,500 on a loan of \$15,000. The lender, who contracted for the full lawful rate of interest upon the loan, was familiar with the whole transaction. In answer to a claim that the charge for commission was a mere contrivance to cover a usurious transaction, it was said (page 398, 85 Va., and page 334, 7 S. E.): "The fact that Henry S. Trout, by whom the \$15,000 loan was made, is a stockholder and director in the trust company—a fact upon which the ap-

pellants lay great stress—does not at all affect the case. The company is an artificial person, created by law, with rights and duties altogether separate and distinct from those of the individuals who, from time to time, may compose it. They have a separate existence, separate interests, and separate liabilities, and so far as the right of an individual member of the company to its earnings is concerned, he is entitled only to his proportionate share of the surplus profits; so that when in the present case the \$1,500 was paid to the company, no part of it was the money of Henry S. Trout. His transaction in loaning the \$15,000, and that of the company in negotiating and guaranteeing the loan, were wholly separate and distinct transactions. Both were ³⁸¹ bona fide, without evasion or the taint of fraud or suspicion; and there is no principle upon which the charge of usury can be sustained."

For the reasons given we think that no usury in the transaction was shown, and that the judge did not err in directing a verdict or in overruling the motion for a new trial.

Judgment affirmed.

All the justices concurring.

USURY—AGENT'S COMMISSIONS.—Usury is not established by mere proof that a sum of money was paid by the borrower as a commission for procuring the loan: *Abbott v. Stone*, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328. In making such payment to a mediator the borrower is compensating his own agent, and the compensation thus paid cannot impress the transaction, as between the borrower and lender, with the taint of usury, if the latter does not profit thereby: See the monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 190, 197. But see, also, *Hall v. Maudlin*, 58 Minn. 137, 49 Am. St. Rep. 492, 59 N. W. 985; *McNeeley v. Ford*, 103 Iowa, 508, 64 Am. St. Rep. 195, 72 N. W. 672.

KEYS v. STATE.

[112 Ga. 392, 37 S. E. 762.]

EMBEZZLEMENT—INDICTMENT.—An indictment for larceny after a trust, alleging that the accused was intrusted with money "for the use and benefit" of a named person, and fraudulently converted it to his own use, is sufficient, and a further allegation that he converted it, "to the injury and without the consent" of the person named, without alleging that any demand was made for the money, is mere surplusage and may be disregarded.

EMBEZZLEMENT—INDICTMENT.—An indictment for larceny after trust, alleging that the accused was intrusted with speci-

fied lawful money for the use and benefit of a person named, is not demurrable on the ground that the trust is not sufficiently set out.

TRIAL—INSTRUCTIONS.—After the trial court has instructed the jury that the accused is charged with having committed the offense alleged in the county named in the indictment, and that this makes the issue to be determined, it is not necessary to charge in connection with each legal proposition involved that it must appear that the offense was committed in such county.

TRIAL—INSTRUCTIONS.—A failure to charge a proposition of law applicable to the case cannot be taken advantage of by assigning error on a charge that is abstractly correct.

TRIAL—INSTRUCTIONS—CHARACTER.—A charge that "defendant has introduced some evidence of good character," which must be considered along with other evidence in the case in determining his guilt or innocence, is not erroneous, either because of the use of the word "some" or because of a failure to more particularly instruct with reference to the law of good character.

CRIMINAL LAW—VENUE—EVIDENCE.—Evidence that the accused was in a particular county intrusted with money, which he thereafter fraudulently converted to his own use, is sufficient to warrant a finding that the conversion took place in that county, in the absence of evidence that he ever left the county or that the conversion was made beyond its limits.

W. E. Mann, for the plaintiff in error.

S. P. Maddox, solicitor general, for the state.

³⁹² **LEWIS, J.** The accused was indicted by the grand jury of Catoosa county for the offense of larceny after trust, the indictment charging, in substance, that the defendant, on January 6, 1898, was intrusted with one five dollar bill, lawful money, of the value of five ³⁹³ dollars, by W. J. Biggers, for the use and benefit of the latter, and did on the day and year aforesaid, in the county aforesaid, fraudulently convert the said five dollars to his own use, to the injury and without the consent of Biggers, and without paying Biggers the price thereof. This indictment was demurred to by the defendant, on the grounds that it failed to allege that any demand was made for the money, and that the trust was not specifically set out. The demurrer was overruled by the court, and this ruling constitutes one ground of error alleged in the bill of exceptions. The case proceeded to trial, and the jury returned a verdict of guilty; whereupon the accused moved for a new trial, and excepts also to the judgment of the court overruling his motion.

1. In passing upon the demurrer it appears from the record that the court construed the indictment to be based upon the Penal Code, section 194, which is in the following language: "If any person who has been intrusted by another with any

money, note, bill of exchange, bond, check, draft, order for the payment of money, cotton or other produce, or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished by imprisonment and labor in the penitentiary for not less than one nor longer than five years." It seems to be contended by counsel for the accused that the indictment was based upon Penal Code, section 191, which applies to factors, commission merchants, warehouse-keepers, wharfingers, wagoners, stage-drivers, or common carriers on land or water, or any other bailee, with whom any money, or any other thing of value, may be intrusted or deposited. That section prescribes that if the bailee shall fraudulently convert property to his own use, or otherwise dispose of the same, or any part thereof, without the consent of the owner or bailor, and to his injury, and without paying to such owner or bailor, on demand, the full value or market price thereof, he shall be punished by imprisonment and labor in the penitentiary for not less than two years nor longer than seven years. It will be noted that the punishment prescribed by section 191, two to seven years in the penitentiary, is greater than that prescribed by section 194, which is only from one to five years in the penitentiary. We do not, therefore, think that any of the class contemplated by section 194 was intended to be embraced also in section 191. Otherwise, we would ³⁹⁴ have the novelty in our Penal Code of different grades of punishment being prescribed for the same offense. Now, the criminal acts described in this indictment evidently correspond with the offense set forth in section 194. We think, therefore, the court below was clearly right in construing this indictment to be based upon the provisions of section 194; for the indictment contains almost the identical language of that section, and certainly specifically embodies its idea. It is true it further charges some words used in section 191, by alleging, in substance, that the act was to the injury and without the consent of the person named, and that it was done without paying to such person the price thereof. But the addition of these words to the facts specifically charging the crime under section 194 does not render void the indictment; for the words added "without the consent" of the owner, etc., are mere surplusage, and we think could very properly be treated as such on the trial of the case. It was decided by this court in *Alderman v. State*, 57 Ga. 367, that: "An indictment for larceny after trust, under

section 4422 or 4224 of the code [of 1873], which charges that defendant did fraudulently convert the goods intrusted to him to his own use, need not charge the same was done without the consent of the owner or bailor, and to his injury, and without paying him on demand the full value thereof; these clauses of the sections, or either of them, apply to other disposition of the goods than to the bailee's fraudulent conversion to his own use, and need only be charged and proven in such cases." There is evidently a typographical error in the figures "4224" mentioned in that decision. It should be "4424." Section 4422 referred to in the decision is embodied in section 191 of the present Penal Code. The other section mentioned, "4224," has no application to the subject, but 4424 has, and is embraced in section 194 of the Penal Code. As this indictment before us charges that the accused converted to his own use the money intrusted to him, under the above decision he is not such an offender as that the law requires a charge or proof that he did the act without the consent of the owner and to his injury, and without paying him on demand, in order to authorize his conviction.

2. As will have been seen, the indictment distinctly alleged that the accused was by Biggers intrusted with the money "for the use and benefit" of the latter. It is, therefore, certain that a trust of some ³⁰⁵ kind was set out, and the nature of this trust is, we think, for all practical purposes, sufficiently indicated by the averment to the effect that it was created for the use and benefit of the particular person named in the indictment. It is true it does not state in what way the accused was to dispose of the money for the use and benefit of Biggers. In this respect it might have been made more definite, but can it be fairly said that, because of the omission to go further into detail, the accused was not sufficiently informed of the nature of the charge he was called upon to meet? We think not. If, as matter of fact, Biggers did intrust the accused with five dollars in money with which he was to do something in behalf of the depositor, and if instead of complying with the obligation thus imposed he fraudulently converted the money to his own use, did he not know well enough what the indictment meant? The code section cited above makes any person who has been intrusted by another with money or other thing of value "for the purpose of applying the same for the use or benefit of the owner," and who fraudulently converts the same to his own use, guilty of a felony. There is no material difference be-

tween intrusting one with property "for the use" of the owner and intrusting him therewith "for the purpose of applying" it to such use. So the indictment, as to the particular point now under consideration, substantially meets the requirements of the code. In *Carter v. State*, 53 Ga. 326, the indictment alleged that the accused was intrusted with certain melons "for the purpose of applying the same to the sole use and behoof of" the prosecutor. The conviction was set aside because the proof showed that the accused was not to apply the melons themselves to the prosecutor's use, but to sell them and account to him for the proceeds. In speaking of the indictment, however, Trippe, J., said: "We do not suppose that any indictment under this statute ever failed to define both, to wit, the article deposited and the nature of the trust. *Each of them is set forth in the one under consideration.*" The italics are ours. While the case cited did not directly involve the sufficiency of the indictment, it was incidentally in question. At any rate, the eminent jurist who delivered the opinion was evidently satisfied that the trust was clearly enough stated; and if it was in that case, it is in the present one. In the case of *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058, the indictment neither described the character of the bailee nor alleged any purpose for which the bailment was made.

²⁰⁶ Mr. Bishop, in his work on Statutory Crimes, discussing what allegations are necessary in indictments for larceny after trust, says: "The bailment must be averred; but, on principle, the particulars of it need not be, because it is matter of inducement, and so the mere general allegation will suffice." Further on in the same connection he says: "The gravamen of the offense is the conversion; it, therefore, must be distinctly charged. But the analogies of the indictment for embezzlement explain that even this allegation need not be expanded beyond the statutory terms; as, for example, it is sufficient to say that the defendant did 'convert the same to his own use': Bishop on Statutory Crimes, sec. 422. In 7 Encyclopedia of Pleading and Practice, 420, it is stated: "It is believed that, according to the weight of authority, the indictment need not set forth the purposes for which the property was intrusted to the defendant, nor, where he was a bailee, state the purposes of the bailment." In *State v. Turner*, 10 Wash. 94, 38 Pac. 864, this principle is laid down: "In a prosecution for embezzlement, an information charging the crime substantially in the terms of the statute is sufficient, without making specific allegations as to the nature

of the employment or trust relation of the accused": See, also, *State v. Eames*, 39 La. Ann. 986, 3 South. 93. In the case of *People v. Cobler*, 108 Cal. 538, 41 Pac. 401, it was held: "An indictment stating that the money embezzled consisted of public funds of the county, and was received by the defendant as deputy county assessor for the use and benefit of the county, sufficiently states the manner in which the defendant received the money, and the use and purpose for which he held it." In *People v. Hill*, 3 Utah, 334, 3 Pac. 75, it was held: "An indictment, framed in the language of the statute, charging the embezzlement of property intrusted to the defendant 'as bailee,' without setting forth the facts and circumstances of the bailment, is sufficient." We could cite a number of authorities advancing the same idea with reference to charges of embezzlement or larceny after trust. Indeed, so far as our research has extended, the weight of authority is based upon the idea that the gravamen of the offense of larceny after trust is the fraudulent conversion of the property of another, and therein consists the crime of larceny. If this be distinctly stated, the details as to the precise nature of the trust need not be set forth in the indictment, the same being, as stated by Mr. Bishop, merely matter of inducement leading up to the main charge.

397 3. One ground in the motion for a new trial alleges error, because the court erred in charging the jury substantially to the effect that if the defendant did not apply the money for the benefit of the owner, but, as charged in the indictment, fraudulently converted it to his own use, then he would be guilty. It was claimed that this was error, because it failed to tell the jury that the conversion should be made in Catoosa county. It appears from the charge of the court to the jury, set forth in the record, that the trial judge did specifically state what the issue between the state and the accused was. He stated as the contention of the state that "this defendant, after being intrusted by Biggers with a certain five dollar bill, for the use and benefit of Biggers, did, in this county, on the sixth day of January, 1898, fraudulently convert the same to his own use." It was not necessary for the judge, especially without any request from counsel, to state, in connection with each legal proposition laid down for the guidance of the jury, that it must appear that the offense was committed in Catoosa county.

4. There are some complaints in the motion for a new trial that the court erred in the charge given, not because the language used was not correct as an abstract proposition of law

and applicable to the case, but because it failed to embrace some instruction that would be proper in connection with that proposition. This court has repeatedly decided that a charge is not of itself erroneous on this ground: *McIver v. Georgia etc. Ry. Co.*, 108 Ga. 306, and opinion of Presiding Justice Lumpkin, pp. 308, 309, 33 S. E. 901; *Lucas v. State*, 110 Ga. 756, 36 S. E. 87; *Wood v. Collins*, 111 Ga. 32, 36 S. E. 424. By these decisions the principle is well recognized that a failure to charge a proposition of law applicable to the case cannot be taken advantage of by assigning error on a charge that is abstractly correct.

5. Another ground in the motion for a new trial is that the court erred in instructing the jury in the language set forth in the fifth headnote. We do not understand that it is pretended that, as an abstract proposition of law, the instruction of the court upon the subject of good character was not correct. Under the rulings heretofore repeatedly made, as above indicated, such charge cannot be considered erroneous because the court did not more particularly instruct the jury with reference to the law of good character. Nor is there anything in the criticism that he used the word "some" before the word "evidence" in his charge.

308 6. It is contended by counsel for the accused that the verdict is contrary to the evidence, particularly as there was a failure to prove the venue in the case—that is, that the conversion of the money intrusted to the defendant took place in the county of Catoosa. The evidence in behalf of the state is positive that the accused, within the county designated in the indictment, was intrusted with the money, and there was sufficient testimony for the jury to infer that he fraudulently converted the same to his own use. It is true there is no positive testimony as to where this conversion took place, but there were enough facts proved for the jury to infer that it took place in the county where he was intrusted with the money. The only thing in the record to contradict this is the statement of the accused himself, which, of course, the jury had a right to credit or discredit, as they saw proper. The defendant in his statement claimed to have carried the money to Chattanooga, Tennessee, and delivered it to a person standing at or near the door of the store of the merchants to whom the owner of the fund intended it to be delivered. The defendant did not know who this person was. The owner of the money received information that he had obtained no credit for the money by the merchants in

Chattanooga, for whom he intended it. He approached Keys on the subject, who insisted that he had delivered the money, and could prove it by one Owens, and promised to bring Owens forward at a day named and prove the delivery. He utterly failed to ever produce this witness as promised. His conduct to the merchants in Chattanooga, to whom he was to have delivered the money, after he was suspected of appropriating it to his own use, we do not think reflects any credit upon his integrity. It seems he was confronted with the various clerks of the store and the proprietors, and was driven to the necessity of admitting that not one of them was the person to whom he delivered it. We think it a legitimate inference for the jury to draw that his hope in going to the store was to find some one of the former clerks absent and out of the employment of the firm, and to this one he would claim to have made the delivery. So far as the sworn evidence in the case shows, then, there is no proof that he ever left Catoosa county until he had appropriated this money. In Clark's Criminal Procedure, 11, it is declared that it is not always the case that the crime of embezzlement is committed where the property is appropriated. Reference is there made to ²⁹⁰ the decision in *State v. Bailey*, 50 Ohio St. 636, 36 N. E. 233. It was therein decided that, "if the transaction extended to different counties, the authorities generally hold that the jurisdiction of the county in which the act of conversion occurred is not exclusive"; and that court held: "That where a contract of employment was made in L. county, by which the defendant was authorized to sell goods for his employers in S. county, and to account therefor in S. county, and goods were sent from his employer's place of business in L. county to the defendant in S. county, and were sold in S. county by the defendant, and the proceeds converted to his own use, part in S. county and part in another state, the defendant could be prosecuted in L. county." In 10 *American and English Encyclopedia of Law*, second edition, 1025, it is declared: "As a general rule the offense is committed, not where the property is received, but where it is converted, unless it is received with intent to fraudulently convert it. If an employé, agent, or bailee, however, refuses to account for property or money, with fraudulent intent, in the county in which it was received, or, if in that county he conceives the intent to convert the property to his own use, and has possession with such intent, the offense of embezzlement is complete, although he may actually expend or dispose of the money or property in another county."

It is a well-established principle of law that the venue of a criminal case may be shown not only by positive testimony, but also by circumstances. In *Smiley v. State*, 66 Ga. 754, it seems the proof was that the owner kept his hogs at his home in Miller county, and turned them out in the open country, calling them up at night. They were suddenly missed, and about the same time the defendant, who lived near by, though in an adjoining county, sold them some distance away. There being no proof that the hogs ever "used" or ever were over the line, this court said that a verdict of guilty of larceny found in the county of the owner's residence was sustained by proof: See, also, *Robson v. State*, 83 Ga. 171, 9 S. E. 610 (8). The accused in that case was a public officer in the county of Washington. He collected money in that county from the taxpayers. His office was there; he resided there; and it was not affirmatively shown that any of the money was elsewhere after he collected it. It was there decided that venue may be proved by either circumstantial or direct evidence; and in that case it was most amply proved by the evidence in the record.

⁴⁰⁰ 7. After a careful review of the entire testimony in the case, we think it was sufficient to warrant the verdict found by the jury, and that no error was committed by the court in overruling the motion for a new trial. The state made out a prima facie case by showing by positive testimony that the property mentioned in the indictment was intrusted by its owner to the accused, and it never reached the destination for which the owner intended it. There was no evidence that the defendant ever left Catoosa county before the appropriation of this fund. His statement to that effect, as above indicated, the jury evidently did not believe, and they had a right to discredit the same. He claimed to be able to prove a delivery of the money by a certain witness, whose presence he utterly failed to procure. It is unnecessary in this connection to go into details as to the testimony introduced on the trial. We refer above to a few of the facts developed by the testimony, with the view of answering the position which seems to be mainly relied upon by counsel for plaintiff in error in his contention that the venue of this offense was not established.

Judgment affirmed.

All the justices concurring, except Little, J., who dissented.

AN INDICTMENT FOR EMBEZZLEMENT, in some of the states, need not state the particulars of the bailment, but it is suf-

ficient to charge the defendant simply as bailee; and, in Georgia, an indictment which charges that the defendant did fraudulently convert the goods intrusted to him need not charge that it was done without the consent of the owner and to his injury and without paying him, on demand, the full value thereof; See the monographic note to *Calkins v. State*, 98 Am. Dec. 152, 158, on embezzlement and prosecutions therefor.

EMBEZZLEMENT—VENUE.—PROOF that the defendant received the money in question, in a prosecution for embezzlement, in the county named in the indictment is enough, in the first instance, in the absence of evidence from the defendant that he carried the money into another county in the course of his duty and before an unlawful conversion of it: See the monographic note to *Calkins v. State*, 98 Am. Dec. 161.

HAYNES v. WESLEY.

[112 Ga. 668, 37 S. E. 990.]

LIMITATION OF ACTION ON BANK CHECK.—A check on a bank payable on demand is a "simple contract in writing," and the period of limitation in which suit may be instituted thereon is the period prescribed by statute on such contracts, which begins to run from the presentation of the check for payment and refusal to pay, unless such presentation is excused in law.

LIMITATION OF ACTION ON BANK CHECK—NO FUNDS IN BANK.—Generally, the drawer of a check is not bound until payment is demanded and refused, but presentation for payment is not necessary when the drawer of the check at the time of its delivery has no funds to his credit in the bank on which it is drawn, and, in the latter event, the statute of limitations begins to run from the date of the check.

CONTRACTS.—A PAROL CONTRACT that a debt evidenced by a check shall bear no interest, entered into before such check is drawn, cannot vary the terms of the written contract.

W. O. Wilson, for the plaintiff in error.

Tompkins & Alston, for the defendant in error.

669 **LITTLE, J.** Wesley, as administrator de bonis non cum testamento annexo of the estate of Grant, instituted an action against Haynes, to recover a sum of money alleged to be due by the latter to the former. The allegations of the petition are: That John A. Grant was named in the will of the testator as his executor; that he qualified, and letters testamentary were issued to him; that subsequently he resigned his trust, and his resignation having been properly accepted, the plaintiff was appointed administrator de bonis non with the will annexed of the estate of the testator; that on December 17, 1895,

the defendant delivered to Grant, as executor, two checks drawn upon the Atlanta National Bank for two thousand eight hundred and forty dollars, which represented money collected by the defendant as the agent of Grant, executor, and was due to him in his fiduciary capacity. Copies of the checks were attached to the petition. The defendant admitted that the plaintiff was administrator succeeding Grant, executor, as alleged in the petition, and the execution of the checks as alleged, denying their consideration to have been for money collected, but averring that they were given for money loaned to him by Grant, executor. He also demurred to the petition, on the ground that it showed that the action was for money had and received, and that it was barred by the statute of limitations; and on the further ground that the petition does not allege that the checks were ever presented for payment or dishonored. The defendant also pleaded, subject to his demurrer, that by agreement with the executor the debt represented by the checks was to bear no interest. He also pleaded the statute of limitations, and that plaintiff had no right to recover, because if the sum was due at all it was due to John A. Grant, and not to the plaintiff. The court overruled the demurrer, and, on motion, struck the pleas, and the defendant excepted.

The first question which arises is whether the action is barred by the statute of limitations, and the answer to this question will be determined by the character of the suit and the legal obligation which rests on the drawer of a check. The petition, after describing the checks given by the defendant to Grant, executor, as to dates, amounts, payee, and the bank on which they were drawn, alleged that the defendant was indebted to the plaintiff in an amount which ⁶⁷⁰ the checks represent, together with interest from their date; and to the petition the plaintiff attached copies of the checks. While the petition might, and should properly, have more plainly expressed the contract sued on, the demurrer does not raise the point of insufficiency in this particular, but, on the contrary, accepts the allegations made, as constituting an action to recover money had and received by the defendant for the plaintiff. We are of the opinion that, in the absence of a special demurrer calling for more specific allegations, the petition should be construed as an action on the checks as contracts. While it sets out the consideration for which the checks were given, this allegation must be construed as explanatory and made by way of inducement, and not as the basis of the action. Treating the

petition, then, as an action based on the checks, it is necessary to determine the nature of the undertaking between the drawer and payee, which is evidenced by the check, in order to determine the period of time within which the action must be instituted to avoid the bar of the statute of limitations. The Civil Code, section 3767, declares that all actions upon promissory notes, bills of exchange, or other simple contracts in writing shall be brought within six years after the same become due and payable. A check is said by Mr. Daniel, in the second volume of his work on Negotiable Instruments, section 1566, to be "a draft or order upon a bank or banking-house, purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." Taking this definition to be a correct one, it will be found that the instruments sued on met all the requirements named. They were drawn on the Atlanta National Bank, were payable to the order of John A. Grant, executor; one specified the sum of two thousand eight hundred dollars, the other forty dollars; and by their tenor they were payable at once. It is said by Mr. Byles in his work on Bills (eighth edition, by Wood), bottom page 55, that "a check on a banker is, in legal effect, an inland bill of exchange." If it is, the period of limitation is fixed at six years; but as a matter of law there are several differences between a bill of exchange and a simple check, which are clearly pointed by Mr. Justice Swayne in the case of Merchants' Bank v. State Bank, 10 Wall. 647, where he says: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper. The chief ⁶⁷¹ points of difference are, that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer." Judge Nisbet, in the case of Daniels v. Kyle, 1 Ga. 305, said that checks partake somewhat of the nature of bills of exchange, but they also differ from them in several material particulars. But if a check is not to be treated as a bill of exchange, it must not be understood that no contractual

relations exist between the drawer and payee. It is agreed on all sides that the execution and delivery of such a paper assigns to the payee a specified amount represented as belonging to the drawer, in the hands of the drawee, and it is really an undertaking that the bank or banker on whom it is drawn will on demand deliver to the payee the amount of money expressed: Daniel on Negotiable Instruments, sec. 1646. It must, therefore, be ruled that a check on a bank, payable on demand, is a written contract coming within the contemplation of the statute, when "simple contracts in writing" are named, and that the period of limitation prescribed in which suit may be instituted on a check is six years.

But the demurrer further avers that the petition sets out no cause of action, because it does not allege that the checks sued on have ever been presented for payment and payment refused. To meet this demurrer, the plaintiff amended his petition and alleged that no demand was made, because the defendant informed the petitioner and his predecessor that he had no funds in the hands of the drawee with which to pay the checks, and that there were no funds in the hands of the drawee at the time said checks were drawn, belonging to the drawer or to the credit of the drawer, out of which to pay the same. The general rule that presentation of a check and payment demanded is necessary to bind the drawer is thus stated by Mr. Daniel (Daniel on Negotiable Instruments, sec. 1646): "A simple check which is unpaid and has not been presented for payment cannot be used as evidence of any indebtedness from the drawer to the payee; . . . and until demanded the drawer is not bound." There are, however, exceptions to this general rule, and in order to bind the drawer at ⁴⁷² the instance of the payee it is not always necessary that demand shall be made. The same author, in his treatise on Negotiable Instruments, section 1596, says: "There may, however, exist sufficient excuse on the part of the holder for delay or failure in making presentment, or giving notice. Thus, if the drawer had no funds in the bank at the time of drawing the check, or subsequently withdrew them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay or failure in respect to presentment and notice. He is, therefore, liable without presentment or notice, and may be sued immediately," for which he cites a great number of cases in note 4 on page 608: See, also, Byles on Bills and Notes, *20. In the case of Daniels v. Kyle, 1 Ga. 305, Judge Nisbet said: "The drawer has no right

to complain of the holder letting it remain in the hands of the drawee; and he has no right to complain of its not being presented for payment, unless, before presentment, the drawee has failed, or in some other way, by reason of the holder's failure to present, he has sustained injury": See, also, *Patten v. Newell*, 30 Ga. 271. Under the principles above announced, the demurrer was properly overruled.

Complaint is made that the court struck the pleas filed by the defendant. That relating to the statute of limitations has been disposed of above. The plea that the debt by agreement was not to bear interest tended to vary the terms of the written contract. Nothing of the kind was expressed in the writings, and as the writing itself spoke the terms of the contract agreed on, and constituted a liability which carried interest from date, if the circumstances alleged be true, the verbal contract entered into prior to the execution of the checks could not, of course, affect their terms. Nor is there any merit in the averment that the money alleged to be due to the plaintiff as administrator was in fact due to John A. Grant individually. It was admitted in the answer that Grant was the duly qualified executor of the will of L. P. Grant, and that he continued as executor until March, 1900. During this time the checks were given to him as executor, and, being so payable, they subsequently came into the hands of the plaintiff as his successor in the representation of the estate of L. P. Grant. Besides, the checks having been indorsed without recourse by the payee, the defendant could not inquire into the title of the holder, except for the purpose of letting in a defense which he nowhere seeks to make.

Judgment affirmed.

All the justices concurring.

CHECK.—THE STATUTE OF LIMITATIONS begins to run in favor of the drawer of a check, at the latest, upon the expiration of a reasonable time for presenting the check for payment, whether the drawer is injured by the delay or not: *Scroggin v. McClelland*, 37 Neb. 644, 40 Am. St. Rep. 520, 56 N. W. 208. Where the drawer has no funds with the drawee to meet the check, the statute begins to run from its date: *Brush v. Barrett*, 82 N. Y. 400, 37 Am. Rep. 569.

WALTON v. HORKAN.

[112 Ga. 814, 38 S. E. 105.]

ASSIGNMENT—MONEY TO BECOME DUE.—An order to pay to a person therein named the whole of a particular fund yet to become due upon the performance of an existing contract operates, not only as between the drawer and payee, but also as to the drawee, as an equitable assignment of the fund to the payee.

ASSIGNMENT—MONEY TO BECOME DUE—GARNISHMENT.—If an equitable assignment of the whole of a particular fund to become due upon the performance of an existing contract is made before the service of garnishment upon the holder of such fund, the garnishing creditor must be postponed to the assignee, whether the garnishee has notice of the assignment or not.

H. Phinizy, for the plaintiff in error.

D. G. Fogarty and J. R. Lamar, for the defendant in error.

⁸¹⁴ **LUMPKIN, P. J.** The record discloses that W. M. Walton executed and delivered to Maurice Walton an order addressed to the John P. King Manufacturing Company, the body of which read as follows: "Please pay Maurice Walton, or order, the amount you are due me in full, and oblige." Before anything had been paid on this order, P. D. Horkan, a creditor of W. M. Walton, who had instituted against him an action on account for one hundred and twenty-six dollars and eighteen cents, caused a garnishment to be served upon the manufacturing company, requiring it to answer what it was indebted to W. M. Walton. The garnishee answered, admitting an indebtedness of one hundred and eighty dollars and ten cents. Maurice Walton "interposed a claim to the fund in the hands of said garnishee," and traversed its answer, "alleging said indebtedness was due to him and not to defendant, by reason of defendant having made an equitable assignment of the fund to claimant prior to service of the summons of garnishment." The issue thus made came on to be tried before a jury. The claimant introduced certain testimony, and closed. This testimony was sufficient to establish the following state of facts: On November 30, 1898, the manufacturing company gave to W. M. Walton an order for a carload of lumber. He being already indebted to Maurice Walton about eighty-five dollars, showed him this order from the company, and requested him to advance such additional funds as would be necessary ⁸¹⁵ "to get out the lumber," stating that, if he would do this, he (W. M. Walton) would give him an order on the company

for the proceeds of the lumber. To this Maurice Walton agreed, and accordingly W. M. Walton gave to him the above-described order on the manufacturing company. In pursuance of the contract thus made Maurice Walton advanced to W. M. Walton, on December 1, 1898, thirty-five dollars, and on February 1, 1899, twenty-five dollars. At the time the order on the company was given the lumber had not been shipped and the order was not then dated, but it was agreed that it should be dated when W. M. Walton notified Maurice Walton of the shipment. After receiving notice of the shipment, he did date the order January 27, 1899. It was understood that if the proceeds of the lumber amounted to more than the original indebtedness of eighty-five dollars and the new advances, the "overplus" should be paid by Maurice Walton to W. M. Walton, but "if the proceeds were less than the old debt and advances," W. M. Walton should still owe Maurice Walton "the difference." Maurice Walton notified the manufacturing company by telephone of the fact that he had received from W. M. Walton the order upon it for the proceeds of the lumber. The price thereof was not due and payable by the company until the lumber should be checked out and its value ascertained. The superintendent of the company promised to let Maurice Walton know what the value was as soon as the checking out was completed. Before this was done the garnishment had been served. No testimony was introduced in behalf of Horkan. After argument "the court held that the fund had not been equitably assigned to claimant, and accordingly directed the following verdict: We, the jury, find for the plaintiff against claimant, traversing answer, and further find fund in hands of garnishee property of defendant and subject to said garnishment." Thereupon the claimant sued out a bill of exceptions, and by proper assignments of error therein made presented the questions dealt with in the headnotes.

1. The first of these questions is whether or not upon such a state of facts there was an equitable assignment by W. M. Walton to Maurice Walton of the claim of the former upon the manufacturing company for the price of the lumber. We think there was. In 2 American and English Encyclopedia of Law, second edition, 1055, it is said that: "To constitute a valid assignment of a chose in action, no particular form ^{sic} of words or form of instrument is necessary. Any language or act which makes an appropriation of a fund amounts to an equitable assignment of that fund." On pages 1059, 1060, and 1061 of the same vol-

ume we find the following: "It is a general rule that an order payable out of a particular fund operates as an equitable assignment of the fund, not only as between the drawer and payee, but as regards the drawee also, notwithstanding the order may not be accepted by the latter party. . . . In this case it is not essential that the fund assigned should have an actual existence; it is sufficient if it exists potentially. Thus an equitable assignment may as well be made of a fund to come into the hands of the drawee, by virtue of an agency, as of the money actually in hand." While "a mere possibility is not assignable [2 American and English Encyclopedia of Law, second edition, 1026], money to become due upon the performance of an existing contract . . . may be assigned in equity. . . . Whatever may have been the law formerly, and however such a transaction may be regarded now in a court of law, it is well settled that in equity an assignment of moneys not yet due or earned, but which are expected to be earned in the future under an existing contract, is binding and will be enforced": See pages 1027 and 1028, and cases cited under note 2, beginning on the former. The doctrine laid down in the above-quoted extracts was recognized and applied in our case of *First Nat. Bank v. Hartman Steel Co.*, 87 Ga. 435, 13 S. E. 586. See the authorities there cited, and also *Haas v. Oil Nat. Bank*, 91 Ga. 307, 18 S. E. 188, and note the reasoning of Chief Justice Bleckley in *Jones v. Glover*, 93 Ga. 484, 21 S. E. 50. In pointing out why the draft under consideration in that case did not of itself amount to an equitable assignment, he said (page 486, 93 Ga., and page 51, 21 S. E.): "The draft was not drawn expressly on this fund or any other, but purported to be for value received and directed the amount to be charged to account of the drawer."

2. The remaining question is: Was the equitable assignment entitled to priority over the garnishment? The following from 14 American and English Encyclopedia of Law, second edition, pages 857-859, furnishes an apt answer: "As a general rule, the plaintiff in garnishment proceedings stands in no better position than the defendant does with respect to the indebtedness sought to be reached by the process of garnishment, and the process of garnishment will not hold anything which is not legally and equitably the property of the principal defendant; and therefore it is universally held that an assignment by the defendant ^{§17} of the claim due to him, irrespectively of whether the assignment is equitable or legal, will take pre-

cedence of a subsequent writ of garnishment served upon the debtor at the suit of creditors of the assignor, provided the assignment was in good faith and for a valuable consideration. . . . The rule that a prior assignment will take precedence of a subsequent garnishment served on the debtor at the suit of creditors of the assignor applies with equal force, where the chose in action is assigned as security, as if the assignment were absolute and the assignor had parted with all his interest, both legal and equitable, in the thing assigned." Indeed, it is not, as between assignor and assignee, essential to the validity of the assignment that notice thereof should be given to the person from whom the debt is owing; and even in the absence of such notice, the garnishing creditor will be postponed to the assignee, when the garnishment was served subsequently to the making of the assignment: See 14 Am. & Eng. Ency. of Law, 2d ed., 861; also 2 Am. & Eng. Ency. of Law, 2d ed., 1076; Rood on Garnishment, sec. 66 et seq.; 2 Shinn on Attachment and Garnishment, sec. 614, p. 1014; Waples on Attachment and Garnishment, 2d ed., sec. 264.

3. It results from the foregoing that the court erred in directing the verdict of which the plaintiff in error complains. As will have been seen, Horkan's claim against W. M. Walton was not sufficient to exhaust the fund in the garnishee's hands, nor was W. M. Walton's actual indebtedness to Maurice Walton equal in amount to that fund. We do not, however, undertake to decide anything with regard to what disposition should be made of the "overplus," whether viewed from one standpoint or the other; for as to this the bill of exceptions presents no point for us to pass upon.

Judgment reversed.

All the justices concurring, except Simmons, C. J., and Cobb, J., absent.

THE ASSIGNMENT OF DEMANDS yet to become due is considered in the notes to *Field v. Mayor*, 57 Am. Dec. 440-442; *Lowery v. Steward*, 82 Am. Dec. 349; *Harris County v. Campbell*, 2 Am. St. Rep. 474. An order drawn on a fund due the drawer is an equitable assignment of such fund to the assignee or payee of such order, and the assignment is valid against a creditor subsequently garnishing the debtor: Note to *Harvin v. Galluchat*, 13 Am. St. Rep. 674, 675.

STUART v. POOLE.

[112 Ga. 818, 88 S. E. 41.]

EXEMPTIONS — LABORER. — STREET RAILWAY CONDUCTORS whose duties are of a character depending more upon a mere physical power to perform manual labor than upon the possession of mental skill or business capacity, involving the exercise of intellectual faculties, are "laborers," whose wages as such are exempt from garnishment.

E. B. Baxter, for the plaintiff in error.

P. D. Shearouse and F. E. Obenauf, for the defendant in error.

⁸¹⁸ **LUMPKIN, P. J.** The only question presented by the bill of exceptions in the present case is whether or not the wages of the plaintiff in error were exempt from the process of garnishment, on the ground that he was a "laborer" within the meaning of section 4732 of the Civil Code. The case was tried in a justice's court upon an agreed statement of facts, and a judgment was therein rendered subjecting Stuart's wages to the garnishment. He sued out a certiorari, to the overruling of which he excepted. From the agreed statement of facts it appeared that he was a "street railway conductor," and that his duties as such were as follows: "To keep the car in general order; to couple and uncouple trail cars when used; to keep lights dusted off and in proper condition; to keep the guard-rails of the car in proper position; to attend to the trolley and keep it in place; to keep the seats of the car turned; to ⁸¹⁹ help passengers on and off the car; to help put the car back on the track if it gets off, and to help remove all obstructions from the track; to change switches when there are switches, but not to open or close frogs; to get off and flag every railroad crossing; to look out for accidents at the rear of the car." It further appeared from the agreed statement of facts that: "The conductor and motorman have joint charge of the car; the conductor gives the order for starting and stopping, except that the motorman stops the car of his own motion for passengers who hail the car, or who themselves ring the bell to stop; the conductor collects fares and issues transfers. As to keeping schedules, rules 52 of the duties of conductors," as promulgated by the railway company of which Stuart was an employé, "shows that 'conductors must keep the correct time as shown by their company's standard clock. Cars must be run closely to sched-

ule time, and whenever a car is off schedule, the conductor must be prepared to give a reasonable explanation of the cause. Unreliable watches will not serve as an excuse.' The motorman is also responsible for running the car on schedule time, and the same requirements are made of him as to keeping schedule time."

We are of the opinion that the magistrate reached the wrong conclusion from this state of facts, and that the superior court erred in not sustaining the certiorari. The test for determining whether or not a given employé is a "laborer" within the meaning of the above-mentioned section of the code was laid down in the case of *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 58 Am. St. Rep. 330, 25 S. E. 403, and is as follows: "If the contract of employment contemplated that the [employés] services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a 'laborer.' If, on the other hand, the work which the contract required the [employé] to do was, in the main, to be the performance of such labor as that last above indicated, he would be a 'laborer.'" Every occupation, however menial, involves the exercise of some degree of sense or judgment; and every calling, however exalted, carries with it the performance of work which partakes more or less of the nature of drudgery. In the light of the decision in the *Oliver* case and of the cases upon which it was ⁸²⁰ founded, we think the present case argues itself. In our opinion, the agreed statement of facts necessarily conveys the idea that the major portion of the work required of Stuart was of a character depending more "upon a mere physical power to perform manual labor" than upon the possession by him of "mental skill or business capacity, . . . involving the exercise of his intellectual faculties." We also think it quite apparent that the greater portion of Stuart's time must have been occupied in performing labor of the former and not of the latter kind. On the whole, therefore, it is our judgment that he should, under the facts appearing, have been classed as a laborer whose wages were exempt from garnishment.

Judgment reversed.

All the justices concurring, except Simmons, C. J., and Cobb, J., absent.

GARNISHMENT.—A RAILWAY CONDUCTOR, having full charge of trains, is not a "day laborer" within the meaning of exemption laws, and his wages are subject to garnishment: *Miller v. Dugas*, 77 Ga. 386, 4 Am. St. Rep. 90. See, further, the monographic note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 303-309, on who are laborers.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

STATE v. BOGARD.

[25 Ind. App. 123, 57 N. E. 722.]

CRIMINAL LAW.—FORMER CONVICTION may be a bar to a subsequent prosecution, although not had upon a formally sufficient charge. A defective charge may sustain a former conviction.

CRIMINAL LAW.—FORMER CONVICTION upon a defective affidavit not stating any charge known to the law as a criminal offense is not a bar to any subsequent prosecution.

W. L. Taylor, attorney general, C. D. Hunt, M. Moores, and C. C. Hadley, for the state.

A. G. Cavins, W. L. Cavins, and C. E. Henderson, for the appellee.

¹²³ **ROBINSON, C. J.** Appellee was indicted under section 2074 of Burns' Revised Statutes of 1894 for disturbing a meeting. He pleaded in bar a former conviction for the same offense. The only question ¹²⁴ presented is whether the following affidavit charges a public offense: "State of Indiana Before me W. P. Barker a justice of the peace for said county one Harvey F. Ferguson who being duly sworn according to law deposeth and sayeth that on or about the 30th day of July 1898 Milton Bogard was found disturbing the peace in a certain public at Bethana church in Greene county and State of Indiana contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

A former conviction may be a bar to a subsequent prosecution although it was not had upon a formally sufficient charge. A defective charge may sustain a former conviction: *Fritz v. State*,

40 Ind. 18; State v. George, 53 Ind. 434; Greenwood v. State, 64 Ind. 250.

But the distinction must be kept in view between an affidavit which states a charge defectively, and an affidavit which does not state any charge. The affidavit in question does not state any criminal offense known to our system of criminal jurisprudence. It was attempted to be drawn under section 2074 of Burns' Revised Statutes of 1894, but a reading of that section at once discloses that it does not in any way comply with the provisions of that section. The conclusion is stated that appellant was disturbing the peace at a certain time and place, but it is not shown what he was doing, whether anyone else was present, whether his offensive conduct, if any, disturbed or molested any collection of any inhabitants of this state convened for any purpose mentioned, or for any lawful purpose. As the former conviction was not upon any charge known to the law as a criminal offense, it cannot be a bar to any subsequent prosecution. The judgment rendered by the justice was a nullity: Davidson v. State, 99 Ind. 366; Shepler v. State, 114 Ind. 194, 16 N. E. 521; Ford v. State, 7 Ind. App. 567, 35 N. E. 34.

The appeal is sustained.

FORMER JEOPARDY—DEFECTIVE INDICTMENT.—Acquittal upon an insufficient indictment is no bar to another prosecution for the same offense: State v. Ray, Rice, 1, 83 Am. Dec. 90. Acquittal or conviction where the penalty has not been inflicted, upon an indictment void on the face of the record, does not operate as a bar to a subsequent indictment for the same offense; but it is otherwise where the indictment is merely voidable for matter dehors the record: Kohlhelmer v. State, 89 Miss. 548, 77 Am. Dec. 689. See, further, the note to Roberts v. State, 58 Am. Dec. 538.

TURK v. CARNAHAN.

[25 Ind. App. 125, 57 N. E. 729.]

SALES—CONDITIONAL—REMEDY OF VENDOR UPON DEFAULT.—A vendor of property, who retains the legal title in himself until the purchase price is paid, may, upon default in payment, retake the property and thus disaffirm the sale, or he may treat the sale as absolute and bring an action for the price.

SALES—CONDITIONAL—REMEDY OF VENDOR UPON DEFAULT.—A vendor of property, who retains the legal title in himself until the purchase price is paid, cannot, upon default of payment, take possession of the property, sell or otherwise dispose of it, and then sue the vendee for the balance of the purchase price.

W. R. Gardiner and C. G. Gardiner, for the appellant.

P. R. Wadsworth and W. Q. Williams, for the appellees.

¹²⁵ WILEY, J. Appellant purchased of appellees certain personal property under an agreement that the title should remain in them until the full purchase price was paid. Notes were executed for the purchase price, and the note in suit was given in lieu of the original notes, after default in payment had been made and upon an extension of time being given. The complaint avers the execution of the note, that it is due and unpaid, and that a reasonable attorney's fee would be ten dollars. The note sued on describes the property, and contains a clause that the title to the property shall remain in appellees till it is paid for. The case was put at issue and tried by the court; resulting in a general finding and judgment for appellees. Appellant's motion for a new trial was overruled, and he has assigned error: 1. That the complaint does not state facts sufficient to constitute a cause of action; and 2. That the court erred in overruling the motion for a new trial. Some argument is made that the complaint does not state a cause of action, but we are of the opinion that the complaint is sufficient to withstand a demurrer. The motion for a new trial was based upon two grounds, viz.: 1. That the finding is not sustained by sufficient evidence; and 2. That it is contrary to law.

¹²⁶ Upon all material questions of fact, the evidence is in no wise conflicting. The evidence shows that appellant executed the note sued on in payment of a buggy, a sewing-machine, and a binder, which he agreed to purchase of appellees. The property was purchased at different times, and separate notes were executed, all of which were similar to the one sued on, except as to the amounts and dates. Appellant paid upon the three notes about seventy dollars, and when they matured he was unable to pay the balance due. Appellees then requested him to execute a new note for the amount of the balances due on the three notes first executed, and he agreed to do so, and thereupon executed the note in suit. Appellant did not ask for additional time in which to pay the first three notes, but told appellees that he was unable to pay them. After the note in suit matured, appellees sent their agent, one Vance, to collect it, and appellant informed him that he was unable to pay it. Vance then told him that he would have to take possession of the property for which the note was given. Before this, however, the binder described in the note had been

sold by consent of appellees for fifteen dollars, and the amount had been credited on the note. Before the note in suit matured appellant had exchanged or traded the buggy described in the note for another buggy, a better and newer one, upon the express condition that appellees should not object to the exchange. Appellant told Vance of said exchange, and offered to go and get the buggy he purchased of appellees and to turn it over to them, and Vance informed him that the one traded for was all right and would do just as well. Vance asked appellant to execute a chattel mortgage on his horses to secure the balance due on the note, which he refused to do. Vance thereupon took the buggy and sewing-machine and gave a receipt therefor, which stated that the property was to be applied upon the note in suit. Appellant also signed the following statement: "This is to certify that John Turk has turned over one Standard sewing-machine and one Haydock buggy to C. Vance for M. J. Carnahan & Company, to be applied on my note of ¹²⁷ one hundred and twenty-nine dollars, note number 2,500; also second-hand Milwaukee binder. [Signed] John Turk."

Appellees did take possession of said property, and never returned or offered to return it to appellant. When Vance took possession of the buggy he removed therefrom the name plate of the makers, and told appellant that appellees had plenty of their own name plates and would put one of them on. Appellant called several times on appellees and demanded the surrender of his note, and was refused. At one time, when appellant demanded the surrender of the note, one of the appellees asked him how they should sell the property, whether at auction or at private sale, and he told them he did not care. Vance testified that when he took the property from appellant he (appellant) agreed that appellees should take the property and sell it and apply the proceeds on the note; but on cross-examination he admitted that the agreement to which he referred was the one in writing, which is above copied in full. Upon these facts, counsel for appellant maintain in an able brief that there can be no recovery against their client. It is important, therefore, clearly to understand the legal import of the contract expressed in the note, and the construction that courts have put upon such contracts. The contract sued on is a conditional one. The condition is that the title to the property sold, as described in the note, shall remain in the vendors (appellees) until the purchase money is fully paid. The title to the property never passed from appellees, and therefore never vested in appellant. Con-

tracts of this character have long been held valid. The rule is so familiar that further discussion is useless: *Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311; *Bradshaw v. Warner*, 54 Ind. 58; *Payne v. June*, 92 Ind. 252; *Coe v. Johnson*, 93 Ind. 418; *Sinker v. Green*, 113 Ind. 264, 15 N. E. 266; *Green v. Sinker*, 135 Ind. 434, 35 N. E. 262.

Upon default of the vendee to pay, as provided in the contract, the vendor has two remedies: 1. He may retake the property, which is a disaffirmance of the sale; or 2. He may treat the sale as absolute, and bring an action for the ¹²⁸ price: 6 Am. & Eng. Ency. of Law, 2d ed., 480; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Crompton v. Beach*, 62 Conn. 25, 36 Am. St. Rep. 323, 25 Atl. 446; *Fleury v. Tufts*, 25 Ill. App. 101; *George v. Swafford*, 75 Iowa, 491, 39 N. W. 804; *Munroe v. Williams*, 35 S. C. 572, 15 S. E. 279; *Bensinger etc. Co. v. Cain*, 4 Tex. App. 499, 18 S. W. 136; *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014; *Green v. Sinker*, 135 Ind. 434, 35 N. E. 262; *Sinker v. Green*, 113 Ind. 264, 15 N. E. 266.

The undisputed facts in this case show that appellees elected to disaffirm the contract, and took possession of the property described in the note. Having asserted their right to disaffirm the contract, and having taken possession of the property under such disaffirmance, appellees thereby abandoned their right to treat the sale as absolute and sue for the price. The law will not permit a vendor of property who retains the legal title in himself to take possession of it upon default of payment, sell, or otherwise dispose of it, and then sue the vendee for the balance of the purchase price. The authorities are numerous and harmonious upon this proposition: *Thomason v. Lewis*, 103 Ala. 426, 15 South. 830; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Parke etc. Co. v. White River etc. Co.*, 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Crompton v. Beach*, 62 Conn. 25, 36 Am. St. Rep. 323, 25 Atl. 446; *Bailey v. Hervey*, 135 Mass. 172; *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Johnson etc. Co. v. Missouri etc. Ry. Co.*, 52 Mo. App. 408; *Heller v. Elliott*, 44 N. J. L. 467; 45 N. J. L. 564; *Morris v. Rexford*, 18 N. Y. 552; *Seanor v. McLaughlin*, 165 Pa. St. 150, 30 Atl. 717; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867; *Merchants' etc. Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565; *Parlin etc. Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084; *Green v. Sinker*, 135 Ind. 434, 35 N. E. 262; *Sinker v. Green*, 113 Ind. 264, 15

N. E. 266; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. Rep. 287; Hays v. Jordan, 85 Ga. 741, 11 S. E. 833.

¹²⁰ In the case of Green v. Sinker, 135 Ind. 434, 35 N. E. 262, appellees delivered to appellant certain personal property under an agreement that the title thereto was to remain in appellees until it should be paid for. Appellant paid one hundred dollars in cash, and executed three notes for two hundred dollars, maturing at different dates. All of the three notes matured, and appellant only paid thereon forty dollars. Appellees were pressing appellant for payment, and to obtain an extension of time in which to make such payment it was agreed that appellant should execute a note of two hundred dollars, secured by chattel mortgage on other property, to be held as additional security for the three notes originally executed, and that if such note should be paid, such payment would be credited upon the original notes, and that as consideration for such additional security appellees would extend the time of payment of the three notes. The time of extension expired, and no further payments were made. Appellees took possession of the property sold and sought to collect the note and mortgage given as collateral security, they having surrendered the three notes representing the unpaid purchase price of the property. It was held that as the last note was given as collateral security for the purchase money, appellees could not disaffirm the sale and enforce collection of unpaid purchase money.

It seems useless further to pursue the discussion. When appellees took possession of the property, as they had a right to do under the contract, they exhausted their remedy. They elected their own remedy, and, if their election was unwise, we cannot relieve them. Giving the evidence the most favorable construction that can be put upon it, it wholly fails to sustain the finding and judgment. It follows, therefore, that the finding is not sustained by sufficient evidence, and is contrary to law. The judgment is reversed, and the trial court is directed to grant appellant a new trial.

CONDITIONAL SALE—REMEDIES OF VENDOR.—Where chattels are sold upon condition that the title shall not pass until payment is made, the vendor, upon the failure of the vendee to pay, may recover the property or sue for the purchase price: Note to Andrews v. Colorado Sav. Bank, 46 Am. St. Rep. 298. See, also, Perkins v. Grobben, 116 Mich. 172, 72 Am. St. Rep. 512, 74 N. W. 469; Crompton v. Beach, 62 Conn. 25, 36 Am. St. Rep. 323, 25 Atl. 446.

STATE v. HITCHENS.

[25 Ind. App. 244, 57 N. E. 935.]

CONSTABLES—CARE OF PROPERTY—COMPENSATION. A constable is entitled to be reimbursed for necessary and reasonable expenditures made by him in good faith in taking care of and preserving property seized under valid process.

CONSTABLES—SALES—EXPENSES.—The duty of selling goods levied upon by a constable devolves upon himself alone, for which he is allowed a commission, but he cannot charge the parties for and collect the additional cost either of an auctioneer or a clerk employed by him to assist in the sale.

CONSTABLES—COMPENSATION—FAILURE TO ITEMIZE COSTS.—The failure of a constable to itemize in his return of a writ the services for which he has charged does not defeat his right to fees, to which, under the evidence, he is clearly entitled.

F. Swigart, J. C. Nelson, and Q. A. Myers, for the appellants.

D. B. McConnell and E. B. McConnell, for the appellees.

244 COMSTOCK, J. This action was prosecuted against the appellees George W. Hitchens, constable, and John Mitchell and Andrew Ray, his bondsmen, to recover money collected by Hitchens as principal and retained from appellants. Nine creditors of appellants (relators) obtained judgment before a justice of the peace against them, and caused executions to issue to appellee Hitchens as constable. He levied the executions upon the store of the relators in the city of Logansport, Indiana, and sold a portion of the goods to satisfy the same. The relators claim that the total amount due on the judgments, interest, fees, costs, and accrued costs, at the time they were paid, was \$821.72; that the constable charged and retained the sum of \$1,033.77, being \$203.14 more than he was authorized by the statute of Indiana to ²⁴⁵ charge and retain. The cause was put at issue, tried by the court, and judgment rendered for costs in favor of appellees.

The action of the court in overruling appellants' motion for a new trial is the only error assigned. There are four reasons assigned in the motion for a new trial. The first is: "The finding of the court is not sustained by sufficient evidence." The second: "The finding of the court is contrary to law." The record discloses no ruling nor exception thereto upon which to base the third and fourth reasons for a new trial. It remains only, therefore, to consider the first and second reasons for a new trial.

The following is the return made to the writ by appellee Hitchens:

"I received this writ on the first day of June, at 1:30, 1897, and on the twenty-third day of September, by virtue thereof, and also of eight other writs against the same defendants in my hands from the dockets of David Laing and George W. Fender and J. H. Walters, justices of the peace of Cass county, Indiana, I levied all of said writs upon a certain stock of notions, pictures, frames, and toys, etc., belonging to the defendants, situated in a storeroom at 421 Market street, Logansport, Indiana, and I proceeded to have the stock appraised according to law, which was done by Frank M. Polk and James A. Day, and thereafter, to wit, on the fourth day of October, I advertised the said goods for sale as required by law, and when the time of the sale arrived, the said stock having come into litigation by claimants against the property, to wit, a suit by William Douglass in the Cass circuit court, I suspended said sale until the issue of that case was determined, and after the same had been determined I again advertised said stock for sale according to law, by posting three written and printed notices in the city of Logansport at public places therein, and one on the door of the building in which said goods were contained, and at the time appointed for the sale I proceeded to sell said stock of goods under said writs at public auction and outcry, beginning on the sixth day of November and continuing ²⁴⁶ the same from day to day as required by law until the second day of December, when, having realized the sum of \$1,042.10 upon the sale under said writs, I suspended the sale, leaving a portion of the goods levied upon still unsold, and having sold sufficient of the stock to satisfy said writs against said defendants in my hands and out of the proceeds thereof I paid the judgments of \$118.20 in favor of Gustave Burgman, which with interest, costs, and accruing costs amounts to \$167.15; and also another judgment in favor of Gustave Burgman of \$117.35, which with interest, costs, and accruing costs amounts to \$166.34; and also another judgment in favor of Gustave Burgman of \$117.91, which with interest, costs, and accruing costs amounts to \$166.60; and also another judgment in favor of Gustave Burgman of \$119, which with interest, costs, and accruing costs amounts to \$167.21; and also another judgment in favor of the National Jewelry Company of \$35.46, which with interest, costs, and accruing costs amounts to \$59.54; and also another judgment in favor of James E. Patton & Company of \$22.66, which with interest, costs, and accruing costs

amounts to \$46.08; and also another judgment in favor of Daniel P. Rhoads, \$13.33, which with interest, costs, and accruing costs amounts to \$37.35; and also another judgment in favor of Wilson Humphrey & Company of \$92.29, which with interest, costs, and accruing costs amounts to \$114.88; and also another judgment in favor of the Toledo Manufacturing Company for \$85.88, which with interest, costs, and accruing costs amounts to \$108.94—making in all the sum of \$1,033.79; and I have paid the rent and storage room for said goods so levied upon for the period of seventy days, amounting to \$70, and also the appraisers; and the stock of goods being situated in an eligible room in a good locality to realize the largest possible price, and it being necessary to the economical and safe management of the sale to employ an auctioneer, and it being necessary for the purpose to employ a clerk, I have ²⁴⁷ paid the services of both as part of the costs herein, and I herewith return this writ satisfied in full, and I further certify that the surplus of goods levied upon under this writ and the proceeds thereon are held at this time under other writs against the defendant Charles M. Hanna.

GEORGE W. HITCHENS,
"Constable."

It appears from the record that appellee Hitchens retained from the proceeds of the sale of which he made return, in addition to the fees provided by statute, the amount expended by him for rent of storeroom, the amounts paid the auctioneer, clerk, and watchman, the amount paid for lock for door of the store, and the cost of lighting the room by night.

The proposition that an officer can retain for his services only such fees as are allowed by law requires the citation of no authorities. The principal question presented by this appeal is whether he is entitled to the amounts thus retained or is limited to the fees fixed by statute. The act providing for fees for constables went into force March 8, 1897: Acts 1897, pp. 217, 218. This fee bill is intended to provide compensation for personal services which the law imposes upon him. While the decisions are not in harmony, from the weight of authorities we think the proposition may be deduced that a constable is entitled to be reimbursed for necessary and reasonable expenditures made by him in good faith in taking care of and preserving property seized under valid process.

It was said in *Cramer v. Oppenstein*, 16 Colo. 495, 27 Pac. 713, by the supreme court of Colorado, that "the ordinary fees

allowed by statute evidently were not intended to cover all extraordinary disbursements which the sheriff may be compelled to make in the faithful discharge of such duties." The constable's return, which we have set out, shows the date of the levy, of the expenditures, the appraisement of the stock, the advertisement of the sale, the suspension of the sale because of litigation involving the title of ²⁴⁸ the property, the further advertisement after the determination of said litigation, and the sale of said property from day to day at auction, until the sum of \$1,042.10 was realized therefrom; that he applied of the proceeds of said sale the sum of \$1,033.79 to the payment of the several executions in his hands; that between the time of the levy of the executions and the conclusion of the sale he paid rent for the room in which the goods were stored—the same room in which the judgment defendants had done business—and sold, at the rate of one dollar per day for seventy days. The return further shows the employment of an auctioneer and clerk, but does not state the amount paid the appraisers, the auctioneer, the clerk, the watchman, nor the cost of advertisement. As to these items the return is defective. These items, however, for which the constable retained pay from the money realized were testified to by the constable, and were not disputed. It appears from the record that it became necessary to procure a lock for the door of the storeroom; he testified that he employed and paid a watchman to guard the goods for a time, and that he paid for lighting the storeroom while the sale of the goods was in progress at night.

In *Rogers v. Simmons*, 155 Mass. 259, at page 261, 29 N. E., at page 581, it is said: "There are strong reasons against allowing an officer to use his discretion in making charges against property beyond those expressly allowed by the statute and such expenses as are necessarily incurred in the performance of his legal duties. In this state, when the property is of such a kind that it is necessary for the officer to procure and pay for storage for it, he is allowed such sums as are properly so paid. . . . But for all the officer's personal services, whether ordinary or extraordinary, the fees expressly provided by the statute are intended to be the only compensation."

Neither the necessity for the storage of the goods, the procuring of the lock, nor the reasonableness of the amounts ²⁴⁹ paid for the use of the storeroom, or for the lock, or the watchman, are questioned. The sale of the property was a personal service, the duty of performing which the law cast upon the constable,

and for which the fee bill allowed him a commission. The law would not authorize him to charge the parties for the additional cost either of an auctioneer or a clerk. The duty of selling the goods devolved upon the officer. An office is accepted with its burdens. In some cases in which the officer is called upon to act, the compensation made by statute seems small; in others it is ample.

Counsel for appellant argue that inasmuch as the constable did not itemize in the return of the writ the services for which he charged that he is entitled to no fees. This claim of counsel might be allowed, did not the various items for which he retained the money in question fully appear from the evidence before us. The valid may readily be separated from the invalid. The law cast upon the officer the obligation of protecting and taking care of the goods. The storage and the securing of the lock and the watchman were necessary to the discharge of this obligation for which the fee bill made no provision: See *Smith v. Huddleston*, 103 Ala. 223, 15 South. 521.

The finding of the court allowed appellee to retain the amounts paid to him for auctioneer and clerk hire. As to these items, the judgment was contrary to law. Many cases are cited by counsel representing the adversary parties. When applicable to the facts shown by the record before us, they are not in conflict with the opinion herein expressed. Constructive fees are not allowed in Indiana, but reasonable and necessary allowances for the care of property held under a valid execution cannot properly be considered fees. They are expenditures for the protection of the property payable out of the fund realized from its sale. The watchman was employed and paid to guard the property pending litigation.

The judgment is reversed and the trial court is directed to sustain appellants' motion for a new trial.

OFFICER'S FEES FOR CARE OF PROPERTY LEVIED ON.— Although no fees are fixed by statute for the care of property held by a sheriff under attachment, the officer is nevertheless entitled to reimbursement for his reasonable charges therefor: Note to *Ela v. Knox*, 38 Am. Dec. 182. But see *Croft v. Brandt*, 58 N. Y. 106, 17 Am. Rep. 213, holding that where a sheriff levies on property under execution his charges for expenses in keeping and watching the property, for boxing it, for cartage, storage, insurance, and for services in preparing it for sale, are not allowable.

DE COUDRES v. UNION TRUST COMPANY.

[25 Ind. App. 271, 58 N. E. 90.]

EXECUTORS AND ADMINISTRATORS—MORTGAGE BY EXECUTORS—PERSONAL LIABILITY.—If an executor, under a power contained in the will to mortgage decedent's land to pay debts, mortgages such land to secure the payment of notes given by the executor as such, and the mortgage refers to the power in the will, and contains a personal covenant of the executor to pay the sum secured, upon default in the payment of the notes and the foreclosure of the mortgage and sale of the land, he is personally liable for any deficiency in the mortgage debt, although the proceeds of the mortgage were applied to the payment of decedent's debts and of liens upon the land mortgaged.

EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY OF EXECUTOR.—The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held liable personally when he does not stipulate for exemption from such liability.

EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY.—A person executing a conveyance in a representative capacity, such as executor, guardian, or trustee, with the covenants for title usual in other deeds, is personally bound by them, though he is under no obligation to make any of them, and has no authority to bind the estate he represented by such covenants.

EXECUTORS AND ADMINISTRATORS—MORTGAGES—PERSONAL LIABILITY OF EXECUTOR.—The foreclosure of a mortgage executed by an executor upon the land of his decedent does not prove that the debt was the debt of the decedent's estate, and not that of the mortgagor, nor prevent the mortgagee from proceeding against the mortgagor personally for a deficiency in the mortgage debt after the foreclosure sale.

A. L. Brick, F. Dunnahoo, and S. Parker, for the appellant.

A. Anderson, J. Du Shane, and W. G. Crabill, for the appellee.

273 COMSTOCK, J. David W. Reece died testate April 18, 1889. Louis De Coudres, as executor, was given power by the will to sell or mortgage the decedent's real estate to pay debts. For this purpose he sold one tract and mortgaged another without the action of the court, but reported the sale in the one case and the execution of the mortgage (not of the notes) in the other to the proper court, and both were confirmed. The proceeds derived from the sale and the mortgage were applied to the payment of debts of the testator and the discharge of liens upon the real estate mortgaged. The mortgage was given to secure the payment of the notes. The mortgage and notes were made by the executor as such. The mortgage referred to the power

given by the will, and contained a personal covenant to pay, its language being as follows: "And the mortgagors expressly agree to pay the sum of money above named without relief from valuation laws." It contained the following further provision: "And it is further expressly agreed that until all of said notes are paid said mortgagor will keep all local taxes and charges against said premises paid as the same become due, and, failing to do so, the said mortgagee may pay such taxes, and the amount so paid, with eight per cent interest thereon, shall be a part of the debt secured by this mortgage."

²⁷³ Louis De Coudres died in 1895, and his widow, Sarah De Coudres, was appointed administratrix of his estate.

Default having been made in payment of the notes, the appellee brought a suit in the St. Joseph circuit court against the heirs and devisees of David W. Reece to foreclose the mortgage, and recovered judgment of foreclosure and an order for sale of the land in question, but no personal judgment or decree against the estate of David W. Reece, and the land was sold under the decree of foreclosure, and bid in at sale by the appellee for less than the amount of the debt, there being a deficiency of two thousand one hundred and seventy-two dollars and six cents; and the appellee then filed this claim against the estate of Louis De Coudres, claiming that by the execution of the notes and mortgage mentioned Mr. De Coudres became personally liable for the payment thereof.

The claim was transferred to the issue docket, and trial had, and the St. Joseph circuit court found that the unpaid balance of the mortgage indebtedness was two thousand one hundred and seventy-two dollars and six cents, and that the estate of Louis De Coudres was liable for that sum, and rendered judgment for the same against appellant. From this judgment appellant has taken this appeal, and the only question to be decided by this court is as to whether or not, by the execution of the notes and mortgage aforesaid, the executor became personally liable for the payment of the debt.

The question before us has been settled, in our opinion, by the decisions of our supreme court.

In *Cornthwaite v. First Nat. Bank*, 57 Ind. 268, *Cornthwaite* was sued on a promissory note made by him and others, and in his answer it was stated, in substance, that the note sued on was given in renewal of a note given by the intestate; that the defendant, having been appointed and qualified as administrator, signed the note in that capacity, and for no other con-

sideration; that he had no individual interest in the transaction, but that the note was given by ²⁷⁴ him as an administrator for the purpose of binding the estate of the intestate, and that it was so understood by all of the parties liable thereon. A demurrer was sustained to this answer, and it was held by the supreme court that Cornthwaite could not bind the estate of the decedent, but bound himself as principal.

In the case of *Botts v. Barr*, 95 Ind. 243, the same rule is applied. This was an action which was brought against Barr, who was administrator, and it was alleged in the first paragraph of complaint that at the time of the death of the intestate there were sawlogs in the plaintiff's logyard, and afterward the defendant, Barr, agreed with the plaintiff to pay a certain amount of money for sawing the same; that the plaintiff sawed the lumber for the defendant, and that the debt was due and unpaid. It is said by the court: "The cause of action here stated is not within the statute (Rev. Stats. 1881, sec. 2310), because it is not 'for the recovery of any claim against the decedent,' and it is not within the first clause of section 4904 of the Revised Statutes of 1881, because the agreement stated is the original agreement of the defendant upon a sufficient consideration. 'The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held personally liable therefor, when he does not stipulate for exemption from such liability.'" The same rule was applied to the second paragraph of the complaint.

In the case of *Long v. Rodman*, 58 Ind. 58, in speaking of the contracts of executors and administrators, the court says: "The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held personally liable therefor when he does not stipulate for exemption from such liability."

The case of *Carter v. Thomas*, 3 Ind. 213, was an action of assumpsit brought against one Chancey Carter, in his ²⁷⁵ individual capacity, as acceptor of an order drawn on him by one McKeen. The acceptance sued on was as follows: "Accepted, to be paid when funds are received for the estate. C. Carter, Administrator." The evidence in the case showed that funds to the amount of three hundred dollars belonging to the estate had, subsequently to the acceptance, come into the hands of said Carter, and that in August, 1850, payment of the accept-

ance was demanded of him and refused; that Carter had resigned as administrator before the commencement of the suit, and that administrators de bonis non had been appointed; and the court found for the plaintiff in the sum of one hundred and twenty-eight dollars. The supreme court affirmed the judgment, saying: "It seems that 'if an executor or administrator promises, in writing, that in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on his promise in his individual capacity, and the judgment against him will be de bonis propriis.'"

In *Holderbaugh v. Turpin*, 75 Ind. 84, 39 Am. Rep. 124, which was a suit brought against Holderbaugh on an agreement to submit certain matters to arbitration, and that each party should, under certain conditions, pay one-half of the costs, the court say: "The mere fact that the matters submitted to arbitration grew out of an action prosecuted by the appellant as administrator does not warrant the inference, as against the positive allegations of the complaint, that he bound himself only in the capacity of administrator." It is further said on page 87 in the same case: "The whole case shows that the object of the plaintiff was to charge the estate of the deceased, by obtaining a judgment against the administrators de bonis intestati. The promise of administrators, on a consideration originating subsequently to their intestate's death, cannot sustain such an action.' . . . The undertaking of appellant was upon a consideration which accrued subsequently to the death of the intestate, and was to do a thing which the intestate's estate was not bound to do. It is impossible, in view of the authorities ²⁷⁶ cited and the character of the undertaking itself, to regard it otherwise than as the promisor's original contract."

Mills v. Kuykendall, 2 Blackf. 47, was an action of assumpsit by the appellee against Mills and Harness, as administrators, on a written agreement to pay money out of an estate. The question was whether the estate could be held on a promise made by the administrators. The court say, among other things, speaking of this action of assumpsit, that: "The promise of administrators on a consideration originating subsequently to their intestate's death cannot sustain such an action." And, proceeding further, say: "The fatal objection to the count is that the plaintiff in his suit goes altogether against the administrators in their representative character—against the estate of the intestate, when, by his own showing, that estate has nothing to do with his cause of action, and can in no way be affected by it."

While the will in the case at bar gave authority to sell or to mortgage the real estate, it did not give authority to execute the promissory notes. The execution of the notes was not essential to the execution of the mortgage; it was not a necessary incident thereto; neither the express promise of the mortgagor to pay the mortgage nor the execution of the notes was necessary. By the terms of the mortgage the mortgagor agreed to warrant the title to the land, and promised to pay taxes and attorney fees. By these promises, which are free from ambiguity and not to be explained by extrinsic evidence, the mortgagor was made personally liable. The rule is thus stated in Jones on Conveyances, section 831: "A person executing a conveyance in a representative capacity such as an executor, guardian, or trustee, with the covenants for title usual in other deeds, is personally bound by them, though he is under no obligation to make any of them and had no authority to bind the estate he represented by such covenants": See, also, Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Barnett v. Hughey, 54 Ark. 195, 15 S. W. 464; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Whiting v. ²⁷⁷ Dewey, 15 Pick. 428; Thornton & Blackl. on Adm., 142-144; 1 Randolph on Commercial Paper, 134; Williams on Executors, 6th Am. ed., 186; 1 Parsons on Bills and Notes, 161.

Counsel for appellant refer to the case of Neptune v. Paxon, 15 Ind. App. 284, 43 N. E. 276; but that was a case where certain stock belonging or supposed to belong to a bank was put in the name of Tyler to hold as trustee for the bank. The stock belonged to the bank, and the bank received all dividends thereon. For some undisclosed reason, the trustee gave his note to the bank for the face of the stock, signing it "W. M. Tyler, Trustee for the Bank." From all that appears in the case, the note was entirely for the benefit of the bank, which was in fact not only the payee of the note but also the party ultimately liable as maker. The court in that case say that a person signing such a contract "is the principal, unless it clearly appears that he is simply signing for another whose identity is unmistakable." But in the case in question there was not any other person for whom De Coudres could act. He had no principal. He could not act as agent for the decedent, nor did he, nor could he, act for the heirs, nor could he act for or bind any estate in giving the notes sued on. He clearly comes within the rule that "the person signing the obligation is the prin-

principal, unless it clearly appears that he is simply signing for another" who can be identified.

Counsel cite *Falk v. Moebs*, 127 U. S. 597, 8 Sup. Ct. Rep. 1319, which was a case which the court say was unambiguous. It was a case where there was a principal who could be, and in fact was, identified by the signature to the note sued on. This is a well-considered case; many authorities are referred to, and in every case where an agent signing his name to a contract was relieved of responsibility, he had a principal for whom he was acting.

Ames v. Holderbaum, 44 Fed. 224, was a bill in equity filed for the foreclosure of a mortgage executed by an executor ²⁷⁸ under power given him by a will which empowered the executor to "stand in his [testator's] place and stand for the purpose of managing and controlling" testator's "property," and to "negotiate loans," and "execute mortgages." The executor borrowed six thousand dollars, for which he gave notes and executed a mortgage on land of the testator. The question arising and determined in that case was not whether the executor was liable on his express contract as shown by his notes, but whether the mortgage was valid and could be enforced against the devisees of the land. The court decided that the mortgage was valid, and nothing further.

Counsel for appellant contend that inasmuch as appellee elected to foreclose its mortgage on the land, it could not thereafter collect the deficiency from the estate of the mortgagor; that the act of foreclosure affirmed the proposition that the debt was the debt of the testator's estate and not that of the mortgagor. This position is not well taken; the notes could not have been properly filed against the estate; the foreclosure of the mortgage was a proceeding in rem against the mortgaged land; no personal judgment was taken against anyone. In this connection counsel for appellant cite *Reissner v. Oxley*, 80 Ind. 580, and *Johnson v. Gibson*, 78 Ind. 282.

In the case first given, the court holds that parties to a contract may put their own interpretation upon it so long as the result is not a contract which is in itself unlawful; further, that when a contract is of doubtful meaning, resort may be had to proof of the situations and circumstances of the parties when they made it, and of their transactions under it, for the purpose of ascertaining the true intention. The personal covenants in the mortgage are not ambiguous. The case is not in point. In the second case, suit was brought against the presi-

dent of a corporation, who had executed a mortgage given by him for the company as its president. The holder of the mortgage foreclosed it and took personal judgment against the corporation. The court ²⁷⁰ held that having treated the mortgage as the mortgage of the corporation and not that of its president, and having obtained not only a decree of foreclosure but also a personal judgment, then, upon the promise contained in the mortgage, it was properly held that he was bound by the interpretation put upon it. The supreme court, however, declined to decide "whether the mortgage, considered apart from all the other circumstances, is that of the corporation or that of the" president.

In the case at bar the notes were not filed as claims against the estate of the decedent. It is contended that if the mortgagor had paid the debt he would have been entitled to subrogation as to the mortgage. Let this be admitted. But the mortgagor did not pay the debt. There is nothing in the record to show that the land did not bring its full value; there is nothing to indicate that his rights were prejudiced by the extension of the time given to secure the debt.

The executor having warranted the title to the real estate, and having expressly promised to pay the debt for which the notes were given, became personally liable.

Judgment affirmed.

AN EXECUTOR HAS NO POWER TO BIND THE ESTATE by a new contract: See the monographic notes to *Fletcher v. American Trust Co.*, 78 Am. St. Rep. 201; *Schlicker v. Hemenway*, 52 Am. St. Rep. 119-122. He has no power to mortgage any of the decedent's lands: See the note to *Fletcher v. American Trust Co.*, 78 Am. St. Rep. 176. Compare *Fletcher v. American Trust Co.*, 111 Ga. 300, 78 Am. St. Rep. 164, and the note thereto, page 202, 36 S. E. 767. An administrator is liable personally, and no action can be maintained against him in his official capacity, upon covenants inserted by him in conveyances of real property of the estate: See the monographic note to *Schlicker v. Hemenway*, 52 Am. St. Rep. 121.

EVANSVILLE AND TERRE HAUTE RAILWAY COMPANY v. WELCH.

[25 Ind. App. 308, 58 N. E. 88.]

NEGLIGENCE—PROXIMATE CAUSE.—If a railway company runs its engine through the streets of a town at an unusual rate of speed, thereby striking a person and hurling his body against that of a third person standing on the railroad station platform, and thereby injuring the latter, such injury is not the natural and probable consequence of the railway company's negligence, nor could it have been foreseen or reasonably anticipated as the probable result of such negligence, and under such circumstances there can be no recovery.

J. E. Iglehart, E. Taylor, and J. T. Hays, for the appellant.

J. S. Bays, for the appellee.

308 HENLEY, J. The appellant by proper assignment of error questions the ruling of the lower court in holding 309 appellee's complaint good against a demurrer for want of sufficient facts. The facts stated in the complaint are substantially the following: That the town of Farmersburg is incorporated and has about one thousand inhabitants, and is provided with streets, sidewalks, and alleys; that appellant has and maintains a depot and station in said town, which is located near the central part of said town at the west side of appellant's track and immediately along the side thereof; that the south end of said station abuts on the main street in said town, which street is called Liston street, and that the platform of said station runs along the east side and the entire length thereof; that said street runs east and west through the entire length of said town and crosses appellant's track just east of the south end of said station; and that appellant's track runs north and south through said town, and that running parallel with said track through said town is a certain sidetrack or switch; that there are a large number of buildings in said town on both sides of said appellant's track and along the line of said Liston street and at and near appellant's said station; and that at all times of day large numbers of persons pass to and from the east and west portions of said town along said street and across appellant's said tracks, and large numbers of persons congregate at and on the platform of appellant's said station for the purpose of taking passage on appellant's passenger train No. 2, especially just before the incoming of appellant's said pas-

senger train, which facts the appellant well knew. In order to make said crossing safe for persons passing along said street, it was necessary that appellant keep the view along said tracks unobstructed and free from all things calculated to obstruct the view, so that persons crossing said tracks at said street could see the approach of locomotives and cars; and that if said sidetrack had cars located thereon it was necessary to insure the safety of passengers that the locomotives should be run at a low rate of speed when crossing said street; that on the 12th of January, 31st 1898, one William Bostic, a resident of said town, who resided on the east side of said railroad track and along the line of said Liston street, left his home for the purpose of going to the station of said appellant, for the purpose of taking passage on its said passenger train No. 2, which was due to arrive from the south at 10:30 A. M.; that after said Bostic left his home he proceeded west on said Liston street to where said street crossed the railroad track, sidetrack, etc.; that at the time the said Bostic approached the said tracks for the purpose of crossing them there was, and had been a long time prior thereto, a large number of flat-cars and box-cars carelessly and negligently placed on said sidetrack, which said cars completely obstructed the view from the south of one who was passing along the line of said street, making said crossing dangerous at said point if an engine or train of cars propelled by an engine was run at a great or unusual rate of speed, all of which facts were well known to appellant; that by reason of said obstructions it was dangerous to all persons on or about said station platform and to persons attempting to cross said track if an engine should be run with great and unusual speed by and past said point, and over and across said street at or near the time when said passenger train No. 2 would be due at said station, all of which facts appellant well knew; that while said Bostic was on the opposite side of the track in the act of crossing said track, and just before said passenger train was due to arrive at said station, a locomotive known as a "wild engine," in charge of the agents and employes of appellant, and running upon the time of train No. 2 and at the time said train No. 2 should arrive at said station, was run upon and across and over appellant's track and through said town, and was by appellant's servants and agents carelessly and negligently run at a dangerous, reckless, and unusual rate of speed along, across, and over appellant's main track where the same crossed Liston street,

to the great danger of all persons who might be attempting ³¹¹ to cross said track at said time, all of which facts were well known to the appellant. Said William Bostic was attempting to cross said street toward the west, and to approach said station for the purpose of taking passage on appellant's train when said "wild engine," running as aforesaid, suddenly, carelessly, and negligently ran upon and against the said Bostic, killing him instantly and hurling his body at and against appellee, who was then and there standing upon the platform of appellant's said station, with such force that appellee, without any fault or negligence on his part, was knocked down, bruised, mangled, and crippled, for which injury he demands judgment in the sum of five thousand dollars. It is further averred in the complaint that at the time appellee was so struck as aforesaid he was in company with a large number of persons standing upon the platform of the station of appellant with the knowledge and consent of the appellant; that he resides in said town and is engaged in the livery business therein, and that in connection with his said business he attends the incoming of all appellant's trains at said station for the purpose of soliciting customers who may arrive on said trains; all of which he does with the knowledge and consent of appellant, and all of which facts appellant well knew.

The above strange and unusual facts are relied upon by appellee as showing actionable negligence upon the part of appellant proximately causing appellee's damage. Was appellee's injury the natural and probable consequence of the negligence charged to appellant, and was his injury such as might or ought to have been foreseen in the light of the attending circumstances?

In the case of *Davis v. Williams*, 4 Ind. App. 487, 31 N. E. 204, the court said: "It is not every tortious act that makes the perpetrator liable in damages if injury occurs, even if such injury is, in some sense, produced or influenced by it. If in any such case some other power or force beyond the control of the original actor may be justly said to constitute the ³¹² more direct cause, and the result following the primary cause was extraordinary, unusual, or unnatural, and the consequences for which damages are claimed were not such as might have been reasonably anticipated, the first cause will be considered too remote to be taken in law as the proximate or efficient one."

It is possible that persons may be injured in the manner in which appellee received his injury. Sufficient proof of this

is the fact that appellee was so injured. But such an injury cannot be said to be one which the most prudent man would have anticipated. The manner in which appellee was injured was unusual and extraordinary and contrary to common experience. It was such an injury as could not have been foreseen or reasonably anticipated as the probable result of appellant's negligent acts. Under such circumstances there is no liability: *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Mitchell v. Chicago etc. Ry. Co.*, 51 Mich. 236, 47 Am. Rep. 566, 16 N. W. 388; *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Allegheny Co. v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649; *Stewart v. Strong*, 20 Ind. App. 44, 50 N. E. 95.

Our supreme court, in the case of *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391, say: "Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong."

It is said in *Pollock on Torts*, 36: "Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety on events that are barely possible. He will order ³¹³ his precaution by the measure of what appears likely in the known course of things."

Taking the facts as stated in the complaint, it does not appear and it cannot reasonably be inferred that appellant failed to observe such precautions for appellee's safety as were reasonable and prudent under the circumstances.

In the case of *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306, 55 Am. St. Rep. 728, 35 Atl. 699, it is said: "Again, the competent railroad engineer knows, from his own experience and that of others in like employment, that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing; he knows death and injury are the probable conse-

quences of his neglect of duty, therefore he gives warning. But does anyone believe the natural and probable consequence of standing fifty feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger; they feel as secure as if in their homes; to them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was ³¹⁴ not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequence of the neglect to give warning. As is said in *South Side etc. R. R. Co. v. Trich*, 117 Pa. St. 390, 2 Am. St. Rep. 672, 11 Atl. 627: 'Responsibility does not extend to every consequence which may possibly result from negligence.' What we have said thus far is on the assumption that the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it."

We think the supreme court of Pennsylvania in the above-quoted case correctly stated the law upon facts not materially different from the case at bar. It was error to overrule the demurrer to the complaint.

Judgment reversed, with instructions to the lower court to sustain appellant's demurrer to appellee's complaint.

NEGLIGENCE—PROXIMATE CAUSE.—Failure to give warning of the approach of a train, which strikes and kills a person, hurling a portion of the body against another person, is not the proximate cause of the injury to the latter so as to make the railroad company liable: *Wood v. Pennsylvania R. R. Co.*, 177 Pa. St. 306, 55 Am. St. Rep. 728, 35 Atl. 699.

MILLER v. PALMER.

[25 Ind. App. 357, 58 N. E. 213.]

COURT REPORTER'S RIGHT TO COMPENSATION.—A party to an action is liable to a court reporter for copies of evidence furnished him by such reporter during the trial, although the litigant does not know that such copies must be paid for in addition to the stenographer's pay as court reporter. His duties are defined by statute, of which the litigant must take notice.

ATTORNEY AND CLIENT—COMPENSATION OF STENOGRAPHER OR COURT REPORTER.—An attorney in general charge of a case may bind his client to pay for copies of evidence furnished by a stenographer or court reporter at the request of the attorney, for use in the trial of the case.

ATTORNEY AND CLIENT—COMPENSATION OF COURT REPORTER—EVIDENCE.—The claim of a court reporter for compensation for copies of evidence furnished a litigant during the trial is not affected by the amount paid by such litigant to his attorney as fees nor his understanding, unknown to the reporter, as to how or by whom the latter is to be paid.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—In an action by a stenographer to recover for copies of evidence furnished by him and used in the trial of a case, evidence by an attorney, who was acting as clerk for the litigant's attorney in arranging the evidence, that such litigant was present when the copies of the evidence were furnished and used is not a privileged communication.

APPELLATE PRACTICE.—ERRONEOUS INSTRUCTIONS are not cause for the reversal of the judgment when the verdict is right.

P. H. Dutch and W. A. Dutch, for the appellant.

C. M. Zion and Palmer & Palmer, for the appellee.

355 COMSTOCK, J. Appellee sued appellant for services rendered in transcribing and furnishing copies of evidence used by attorneys of appellant in a certain suit in which he was plaintiff, for which she alleges he is indebted to her in the sum of one hundred dollars and interest from April 1, 1899; that the services were rendered at his request, for his use and benefit, and for which he promised to pay. Appellant answered by

general denial. A trial resulted in a verdict and judgment in favor of appellee for one hundred dollars.

This cause is before the court for the second time. The former appeal is reported as *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975. The judgment was then reversed upon the ground that under the evidence the appellant (now appellee) was entitled ³⁵⁹ to recover. The court also held that a recovery might be had upon proof of an implied promise, although the complaint averred an express one.

The error now assigned is the action of the court in overruling appellant's motion for a new trial. The reasons set out in the motion are the giving and refusing to give certain instructions and the admission and refusing to admit certain evidence. Appellee insists that the record does not show the filing of what purports to be the bill of exceptions containing the evidence, and that the greater number of questions argued by counsel for appellant are therefore not presented. In our opinion, the record shows a compliance with the act of the general assembly approved March 3, 1899: Acts 1899, p. 384. Under that act the bill of exceptions containing the evidence is in the record.

Counsel for appellee also earnestly contend that the exceptions to the instructions are not properly reserved. Without passing upon this claim of appellee, we have in this opinion treated the questions discussed as properly presented.

The questions raised will be considered in the order in which they are discussed by appellant's counsel. Appellant requested the court to give the following instruction: "The court instructs the jury that they should take into consideration all the evidence given upon the trial to consider all the facts and circumstances shown by the evidence. The condition of the defendant, his knowledge of the matters alleged in the plaintiff's complaint, and if you believe that copies of the evidence alleged to have been furnished by the plaintiff were used by the attorney or attorneys of the defendant, and if you further believe that the defendant knew that such copies were furnished by the plaintiff at the time they were being used, and were being used for the defendant's benefit and with his consent, then it would be your duty to find for the plaintiff; but, upon the other hand, ³⁶⁰ if you believe from the evidence that the defendant did not know that such copies were furnished by the plaintiff, and he was not present at any time when said copies were furnished from time to time, and did not request plaintiff to furnish said copies, then you should find for the defendant, unless you find that there

was an express agreement entered into by and between the plaintiff and defendant to furnish said copies as alleged in plaintiff's complaint." The court modified the instruction by the insertion of the words "at any time" after the word "present." To this modification appellant excepted. This action of the court is made a reason for a new trial.

In support of this exception counsel for appellant insist that the charge as requested announced the rule of law laid down in the case upon the former appeal, and that the modification changed its meaning. That as modified it said to the jury that if the defendant was present once during the trial when copies of the evidence were furnished, whether he saw the copies used or not, or whether they were used in his presence or not, then he would be liable, because it would be held to have been done with his knowledge or consent. In view of the fact that the evidence shows that the trial lasted for many days, that copies of the evidence were furnished to appellee's counsel from time to time and constantly used in his presence, that he knew at the time that no one but the reporter could furnish them, we are of the opinion that the appellant could not have been harmed by this instruction, even if it were error to make the modification.

The ninth reason for a new trial is the action of the court in refusing to give the following instruction requested by appellant: "The court instructs the jury that in determining whether the defendant expected that the services alleged to have been rendered by the plaintiff were to be paid for by defendant, you may take into consideration, together with the other evidence given upon the trial, the fact, if shown by the evidence, that the plaintiff was an official reporter of ³⁰¹ the court in which the cause was being tried in which she alleges that she furnished the copies described in her complaint, and whether the defendant knew that the services alleged to have been performed by plaintiff were such services as were to be paid for in addition to her pay as such court reporter to be paid for by the parties to said action." In this there was no error. The duties of the reporter are defined by statute, of which the litigant must take notice. The instruction is based upon the erroneous theory that unless the defendant knew that the services performed by the reporter for him were such as were to be paid for in addition to her pay as reporter, he would not be liable.

The tenth reason for a new trial is the giving of instruction No. 1, asked by the appellee. To this instruction objections are made: 1. That while it attempts to state, it does not correctly

state the averments of the complaint; 2. That it is in conflict with the instruction given by the court on its own motion. These objections are not well taken. They are not sustained by the record.

The twelfth and thirteenth reasons for a new trial relate to the same question—the refusal of the court to permit appellant to testify that he never employed nor authorized his attorney to employ the appellee. It is claimed in appellant's brief that appellee testified that appellant had authorized her employment by his attorneys. No reference is made to any part of the record where such evidence is to be found, and we find none. If an attorney having general control of a cause has authority by virtue of such relation to bind his client for the value of copies of evidence furnished by a stenographer and used in the cause, the client would be liable in the absence of special authority, and he would still be bound, notwithstanding he was ignorant of the employment of the stenographer. The authority of the attorney under the evidence in this cause is the controlling question presented.

In *Harry v. Hilton*, 64 How. Pr. 199, it is held that a ³⁶² client is responsible for stenographer's fees in proceedings in a case where such stenographer is employed by attorneys to take the minutes, the court saying: "These cases introduce no new rule in the law regarding contracts, but simply enforce an old one. Their significance, however, lies in the fact that in the decision of these cases the courts assume that such action upon the part of the attorney is presumably within the scope of the authority conferred upon him, when he is retained by his client, and that the attorney has the right to bind his client for any service which may be necessary and proper not only for the preparation of the case for trial, but for the convenient conduct of such trial and the proceedings thereafter taken": Citing *Covell v. Hart*, 14 Hun, 254; *First Nat. Bank v. Tamajo*, 77 N. Y. 476.

In *Williamson-Stewart etc. Co. v. Bosbyshell*, 14 Mo. App. 534, it is held that an attorney has implied powers to bind his client by a contract for the printing of briefs for use in an appellate court.

In *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72, the court held that an attorney at law has authority by virtue of his employment as such to do in behalf of his client all acts in and out of court necessary or incidental to the presentation and management of the suit which affect the remedy only and

not the cause of action: See *Clark v. Randall*, 9 Wis. (*135) 128, 76 Am. Dec. 252; *Nelson v. Cook*, 19 Ill. 440, 453; *Newberry v. Lee*, 3 Hill, 523; *Oestrich v. Gilbert*, 9 Hun, 245; *Jenney v. Delesdernier*, 20 Me. 183, 191; *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194.

In *Thornton v. Tuttle*, 20 Abb. N. C. 308, it is held that the attorney for a party to an action has implied authority to bind his client by the employment of a stenographer to take and write out the testimony of witnesses upon a reference of a special issue. In commenting upon the testimony the court say: "The plaintiff Thornton says he had no knowledge, and it does not appear that he had before the trial, of the order of reference which directed the ³⁰⁸ payment by the defendants in that action of the expenses of taking the testimony. And it might not have defeated the plaintiff's recovery if he had. The plaintiff Thornton had the right to assume, unless in some manner advised to the contrary, that the attorney who employed him had the authority which his relation as such to his clients imported. And his right of action against them was not affected by any secret or confidential instructions given by them to him qualifying his authority." The following cases are cited in the opinion: *Judson v. Gray*, 11 N. Y. 408; *Bonynge v. Field*, 81 N. Y. 159; *Bonynge v. Waterbury*, 12 Hun, 534; *Sheridan v. Genet*, 12 Hun, 660; *Covell v. Hart*, 14 Hun, 252; *Harry v. Hilton*, 64 How. Pr. 199.

In *Bonynge v. Field*, 81 N. Y. 159, the court held that in the absence of a special agreement making a personal liability an attorney for one of the parties to an action could not be held personally responsible for the services of a stenographer. To the same effect is *Bonynge v. Waterbury*, 12 Hun, 534.

In *Sheridan v. Genet*, 12 Hun, 660, it was held that where a stenographer furnishes a copy of the testimony given upon the trial of an action to one whom he knows acted as counsel for one of the parties thereto, he cannot recover the price thereof from such counsel unless the latter expressly binds himself for the payment thereof, following *Bonynge v. Waterbury*, 12 Hun, 534. See, also, *Hogate v. Edwards*, 65 Ind. 372.

Under the foregoing decisions, we feel warranted in holding that the attorneys in the case at bar had authority to bind their client, the appellant, to pay appellee for the copies of the evidence which she furnished at their request.

Appellee testified in her examination in chief, no objection being made thereto, that two trials of appellant's case were

had, in the first of which the jury returned a verdict in his favor for twelve thousand dollars; in the second, for ten thousand dollars.

The counsel for appellant propounded to him in his examination ³⁶⁴ in chief the following question: "State the amount of attorney fees you paid in your case against the Monon Railroad Company." The court sustained an objection to this question, and refused to permit appellant to prove that he had paid three thousand and seventy dollars in attorneys' fees in the cause. These rulings of the court are made the fourteenth and fifteenth reasons for a new trial. It is urged that it was proper thus to show the real amount received by appellant, and rebut the claim of appellee that appellant was to pay her and throw light on the question as to how the parties expected her to be paid. If appellee was entitled to compensation from appellant, neither the amount paid to his attorney as fees nor his understanding, unknown to her, could affect her claim. The evidence sought to be elicited was immaterial. They also propounded to him the following question: "State what knowledge you have of proceedings in court." The court sustained an objection to this question, and this ruling is made the ground for the sixteenth and seventeenth reasons for a new trial. The claim of appellee acting under authority of appellant's counsel could not be affected by appellant's knowledge or want of knowledge of proceedings in court. Appellee testified that she did the work for which she sues at the request of appellant's counsel. In this she was not contradicted.

The eighteenth and nineteenth reasons for a new trial relate to the admission of the testimony of Joseph H. Ricketts, a young attorney, who testified to having arranged and made a digest of the evidence, a delivery of the copies transcribed by the appellee for the defendant and of the use made of the copies. This work was done while he was acting as clerk for Mr. Gard, one of the attorneys for appellant.

The material fact to which this witness testified was that appellant was in the courtroom when appellee was acting as reporter, when the copies of the evidence were furnished his attorneys, and when in the trial of the cause such copies ³⁶⁵ were used by them. He was not the attorney for appellant. These material facts occurring in the courtroom in the trial of the cause were not privileged.

The twentieth and twenty-first reasons for a new trial relate to a conversation testified by appellee to have occurred between

herself and Mr. Wesner, an attorney for appellant in his absence. This conversation was given without objection. Appellant then moved to strike it out. The court overruled the motion. The objection should have been made before the testimony was given. But as the attorneys were competent to bind their client, the evidence was competent: *Cleveland etc. Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569.

The twenty-second reason for a new trial is the alleged error of the court in overruling appellant's objection to appellee's question as to the use of the evidence upon the second trial, transcribed and delivered to attorneys for appellant in the first. In this there was no error.

Counsel for appellant discuss the twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh reasons for a new trial together. In these reasons for a new trial appellant's learned counsel seek to show that the trial court erred in not permitting the proof of the agreement between appellant and his counsel, Mr. Wesner, under which all expenses were to be paid by Wesner; that while he had paid one of the reporters for services rendered his attorneys, the amount so paid had been deducted from the attorney's fee.

As it is not claimed that appellee had knowledge of this agreement, it could not have affected her, and the evidence is therefore immaterial.

Appellant makes the giving of instruction No. 3, requested by appellee, the eleventh reason for a new trial. The correctness of this instruction considered alone may well be questioned, but we have read the evidence, and accepting the law as announced in the opinion upon the former ³⁶⁶ appeal as the law of the case, we are satisfied that upon the evidence the verdict was right. Under numerous decisions erroneous instructions are not a cause for reversal when the verdict is right: *Stockwell v. Brant*, 97 Ind. 474; *State v. Ruhlman*, 111 Ind. 17; 11 N. E. 793; *Woods v. Board etc.*, 128 Ind. 289, 27 N. E. 611.

We find no error for which the judgment should be reversed. Judgment affirmed.

FEEs FOR STENOGRAPHERS' NOTES may be allowed as costs: See the monographic note to *Ela v. Knox*, 88 Am. Dec. 182.

APPEAL—INSTRUCTIONS.—If the result reached by the trial is correct, errors in giving or refusing instructions must be treated as harmless on appeal: *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648, 80 S. W. 323.

EX PARTE JENKINS.

[25 Ind. App. 532, 58 N. E. 560.]

EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS OF ADMINISTRATION—EX PARTE APPLICATION.—While the court has a discretion in granting or refusing applications for letters of administration, yet when the proceeding is purely *ex parte* and a verified application shows the party entitled to letters, they should be granted.

EXECUTORS AND ADMINISTRATORS.—THE RIGHT TO LETTERS OF ADMINISTRATION does not depend upon the existence of tangible assets to administer upon, but the application should show some claim, or the right to enforce some claim, in favor of the estate.

EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS OF ADMINISTRATION.—If a sheriff negligently permits a prisoner to be taken from jail and killed, the widow of such prisoner is entitled to letters of administration on his estate, although the only tangible asset thereof is a right of action on the official bond of the sheriff.

W. R. Crawford, W. H. Najdowski, and M. Moores, for the appellants.

533 ROBINSON, C. J. Lulu C. Jenkins applied to the Ripley circuit court for letters of administration *de bonis non* on the estate of her deceased husband, William H. Jenkins. The court denied her application, and upon that action of the court she predicates error. Upon the application of the petitioner this cause was advanced upon the docket of this court.

The proceeding below was *ex parte*, and in her verified petition she shows that her husband, William H. Jenkins, was an inhabitant of Ripley county, Indiana; that in September, 1897, he was held by Henry Busching, the sheriff of Ripley county, as a prisoner in the county jail at Versailles, and that on or about the fifteenth day of September, 1897, a mob composed of divers persons entered the jail and killed Jenkins and other prisoners then in the custody of the sheriff; that Jenkins left an estate worth less than five hundred dollars, which was, by a decree of court, vested in the petitioner as widow; that except the above there is not now, and never has been, any administration of his estate, nor has any executor or administrator ever been appointed; that decedent left no children; that there are no claims due from or to the estate except a claim for the killing of decedent, which she desires to prosecute.

While it is true the circuit court has a discretion in granting or refusing applications for letters of administration, yet where

the proceeding is purely *ex parte* and a verified application shows the party entitled to letters, they should be granted. The right to letters does not depend ⁵³⁴ upon the existence of tangible assets to administer. "There are instances," said the court in *Toledo etc. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199, "in which such appointment may become proper and necessary in order to prosecute some claim of indeterminate value, or to make satisfaction of record of a claim which had been paid but not satisfied, and perhaps for other purposes."

It appears the court found generally the settlement of the estate; that there were no assets and no administration pending, as set out in the petition, and also found that Jenkins was killed September 15, 1897; that the petition was filed February 23, 1900, and that any right of action arising out of the killing expired by limitation of law September 16, 1899, and since that date has not constituted an asset of the estate. In an application for letters, where there are no tangible assets to administer, the application should show some claim or the right to enforce some claim in the estate's favor. The application does this, and being verified and *ex parte* its averments must be taken as true.

The application states, among other things, "that on or about the fifteenth day of September, 1897, the said William H. Jenkins was in the full enjoyment of his health and life, but was held by Henry Busching, the sheriff of said Ripley county, Indiana, as a prisoner in the county jail at Versailles, Indiana, and that on or about the fifteenth day of September, 1897, a mob composed of divers persons entered into the said jail at Versailles, Indiana, and killed the said William H. Jenkins and other prisoners in the custody of said sheriff at said place either by shooting or clubbing or hanging."

It is unnecessary to cite authorities to the effect that when a sheriff takes property of any kind into his possession by virtue of a writ, he is bound to take ordinary care of the property and prevent its deterioration or destruction, and for a failure in this regard he is liable on his bond. There certainly can be no reason for saying that his duty as to ⁵³⁵ care is not at least equally obligatory in respect of a prisoner who is in his custody by virtue of his office. In *State v. Gobin*, 94 Fed. 48, Baker, J., said: "When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This

duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond: *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818; *Hixon v. Cupp*, 5 Okla. 545, 49 Pac. 927."

The sheriff of the county has the care and custody of prisoners committed to the county jail. The duty the sheriff owes to the state to keep a prisoner committed to his custody and deliver him over to the proper authority at the proper time is no more compulsory than is the duty he owes the prisoner himself to exercise reasonable and ordinary care to protect the prisoner's life and health. If he permits a prisoner to escape or to be taken from his custody the fault is *prima facie* his, and there has been *prima facie* a breach of official duty for which he is liable on his official bond. The sheriff's conduct in this instance may have been such that a right of action accrued to decedent before his death which would not necessarily abate at his death. But in this case it is not necessary that we should decide, and we do not decide, anything upon that question.

It was necessary that the petitioner show a *prima facie* right to letters. She might, under certain circumstances, prosecute an action against those who killed her husband, although more than two years had elapsed since the killing. The limitation does not necessarily and of itself prevent the action. The defendant, or defendants, as the case might be, may take advantage of that fact or it may be waived. Whether they would or would not do so cannot determine the petitioner's right to letters. Having by her petition shown a ⁵³⁶ *prima facie* right to letters, her petition should have been granted.

Judgment reversed, with instructions to grant the petitioner's application. The clerk is directed to certify this decision to the lower court at once.

LETTERS OF ADMINISTRATION, WHEN GRANTED.—The discretion of a probate court to issue letters of administration to one applying therefor is considered in *Kidd v. Bates*, 120 Ala. 79, 74 Am. St. Rep. 17, 23 South. 735, and in the note to *Berry v. Hamilton*, 54 Am. Dec. 518-522. As to the amount susceptible of being administered upon, apart from any statute fixing the minimum, there seems to be no limit; the existence of assets within the jurisdiction of the court, though the value is merely nominal, will enable it to grant letters: Note to *Turk v. Turk*, 46 Am. Dec. 433.

GRAY v. COVERT.

[25 Ind. App. 501, 58 N. E. 731.]

RECEIVERS—APPOINTMENT IN ANOTHER STATE—TITLE OF.—A receiver appointed for a foreign corporation in one state does not thereby acquire such title to the property of the corporation situated in another state as to defeat an attachment subsequently issued at the instance of a creditor by a court of the latter state.

J. G. Owen, H. M. Logsdon, H. Mason, and A. J. Veneman,
for the appellants.

G. A. Cunningham, for the appellees.

⁵⁰¹ **COMSTOCK, J.** The controversy in this case arises between the appellants as receivers, and the appellee, Mitchell, Tranter & Company, an attaching creditor of the Herring-Hall-Marvin Company. But a single question is involved: Does a receiver appointed for a foreign corporation in another state thereby acquire such title to the property of the corporation situate in this state as to defeat an attachment subsequently issued at the instance of a creditor by the courts of this state?

The Herring-Hall-Marvin Company is a foreign corporation, organized under the laws of the state of New Jersey. On December 23, 1897, the appellants were appointed its receivers by the circuit court of the United States for the district of New Jersey. The bond and oath of the receivers are set out in the record and bear date December 24, 1897. It also appears, although at what date is not shown by the record, that one Samuel Fitton was appointed receiver by the court of common pleas of Butler county, in the state of Ohio, in a suit brought by William and Moses Mosler. This cause was removed to the circuit court of the United States for the southern district of Ohio, western division, and the ⁵⁰² Honorable William H. Taft, judge of that court, on December 31, 1897, removed Fitton and appointed the appellants as receivers in his place. It also appears from the record that the appellants had been appointed receivers in New York, Pennsylvania, and Kentucky. So far as the record shows, no receiver was ever appointed or applied for in the state of Indiana.

The appellee, Mitchell, Tranter & Company, being a creditor of the Herring-Hall-Marvin Company, on December 30, 1897, filed its complaint, affidavit, and bond in the superior court of

Vanderburgh county, and on the same day caused an attachment to issue, which came into the hands of the sheriff of said county. The sheriff having levied on and taken into his possession the property of the Herring-Hall-Marvin Company involved in this suit, the appellants, as receivers of the company, on May 27, 1898, brought their suit in the court below to recover from the sheriff and Mitchell, Tranter & Company possession of this property.

The cause was submitted to the court, who found for the defendants and rendered judgment accordingly. A motion for a new trial, assigning as causes that the decision of the court was contrary to law and not sustained by sufficient evidence, was overruled, and this ruling is the only error assigned by the appellants.

Recognizing the rule of the appellate courts of this state that a judgment will not be reversed upon appeal, upon the evidence only, when it fairly tends to sustain the finding of the court or the verdict, counsel for appellants insist that in the case at bar there is no evidence to sustain the finding and judgment of the trial court. They contend that the appointment of appellants as receivers of said company, it being effected upon the petition of the president pursuant to a resolution of the board of directors of the company, constituted a voluntary assignment, being equivalent to an assignment by a voluntary deed of assignment of all the company's property for the benefit of its creditors without the ⁵⁶³ intervention of a court; that such appointment had the effect of transferring to them all of the property of the insolvent corporation wherever situate, so as to defeat appellees' claim under the attachment issued. This claim is based upon the statute of New Jersey, by authority of which the receivers were appointed, proof of which was made and which provides: "All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchise, rights, privileges, and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

Counsel for appellant quote from *Union Sav. Bank v. Indianapolis Lounge Co.*, 20 Ind. App. 325, 47 N. E. 846; *Hurd v. Elizabeth*, 41 N. J. L. 1. In *Union Sav. Bank v. Indianapolis Lounge Co.*, 20 Ind. App. 325, 47 N. E. 846, it is held that a general assignment for the benefit of creditors, by a resident of another state, in conformity to the laws of such state, passes to the assignee title to a general deposit of money in a bank in this

state, and that such deposit cannot be attached by a creditor of the assignor in this state. In *Hurd v. Elizabeth*, 41 N. J. L. 1, it was held that a receiver appointed in a foreign jurisdiction might sustain a suit to recover property in the courts of New Jersey, provided the rights of creditors did not intervene. It does not decide that a receiver had the right to take property as against an attachment creditor. Counsel also cite *Chicago etc. Ry. Co. v. Keokuk etc. Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Bagby v. Atlantic R. R. Co.*, 86 Pa. St. 291; *Killmer v. Hobart*, 58 How. Pr. 452. In *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291, it was held that where a receiver had been appointed by the courts of another state, the courts of Pennsylvania, on the ground of comity, would recognize his appointment, provided the same did not conflict with the rights of citizens of Pennsylvania; and further, that a creditor residing in the state where the appointment was made was so far bound by the decree that he could not leave his own state to come into Pennsylvania and attach the property of the corporation, and ⁵⁶⁴ thereby avoid the effect of the appointment of a receiver by the courts of his own state. In *Chicago etc. Ry. Co. v. Keokuk etc. Co.*, 108 Ill. 317, 48 Am. Rep. 557, the court held that the powers of a receiver are coextensive only with the jurisdiction of the court appointing him, and a foreign receiver will not be permitted, as against the claims of creditors resident within the state, to remove from the state assets of the debtor, it being the policy of every government to retain in its own hands the property of the debtor until all domestic claims against it have been satisfied. It was further held that where a receiver has once obtained rightful possession of personal property situate within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession though he take it in the performance of his duty into a foreign jurisdiction. In *Killmer v. Hobart*, 58 How. Pr. 452, it was held that receivers appointed in New Jersey and operating a railway as such receivers in New York, but having property in their hands as such receivers in New York, could not be sued in the courts of the last named state and an attachment issued in such suit will be vacated.

The statute of New Jersey could have no effect beyond the territorial limits of that state. While it has been held in this and other states that a voluntary assignment for the benefit of creditors executed in one state transfers the title of property

of the assignor wherever situate, it does not follow that title to the property of an insolvent passes to a receiver. The assignment is the act of the debtor; the right to transfer his property may be exercised by him independently of statute. Receivers are appointed by courts pursuant to statute. The act of the legislature is limited in its operation to the state.

The question under consideration has been decided by the supreme court of this state in the case of *Catlin v. Wilcox etc. Co.*, 123 Ind. 477, 18-Am. St. Rep. 338, 24 N. E. 250. The facts were as follows: Clapp & Davies, of Chicago, were indebted to certain ⁵⁶⁵ judgment creditors in that city. They were also indebted to the Wilcox Silver Plate Company and others, of the state of Connecticut. At the same time Bagley & Oberreich, at La Porte, Indiana, were indebted in a considerable sum to Clapp & Davies. One of the judgment creditors instituted proceedings against the firm in Chicago, and on April 14, 1897, Catlin was appointed receiver. The court made an order requiring Clapp & Davies to execute a deed of general assignment transferring all their partnership property and effects to the receiver. Subsequently, in the month of June, the Wilcox Silver Plate Company brought an attachment suit in the La Porte circuit court against Clapp & Davies, and Bagley & Oberreich, as garnishees. Other creditors became parties thereto. Catlin, the receiver, intervened and claimed the property attached by virtue of his prior appointment. The attachment creditors were sustained. In the course of the opinion the court say: "A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court, whose jurisdiction may be aided but in nowise enlarged or extended, by his appointment. His power is only coextensive with that of the court which gives him his official character. While it has been held that a court may appoint a receiver, and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment of its own force gives him the right to take possession of the property, but it confers upon him no power to compel the recognition of that right outside the jurisdiction of the court making the appointment." Upon the question of nonresident attaching creditors the court say: "It is said, however, that the principles of comity which control in aid of the receiver of a foreign court, who is seeking

to obtain possession of a fund, should only be suspended in their operation in favor ⁵⁶⁶ of domestic creditors, and that inasmuch as the attaching creditors in the present case are all nonresidents of the state, the aid of the court should have been extended to the receiver and denied the creditors. While this position is not without support, it is not, in our view, maintainable. Although nonresidents, the attaching creditors are properly in our courts, pursuing a remedy which the statute confers upon foreign as well as domestic creditors. Until the legislature shall declare a different policy, the rights of a foreign creditor against the property of a debtor must be regarded by the courts as in all respects the same as those of resident creditors, so far as respects proceedings in attachment and garnishment. The rule which commends itself to our judgment is thus declared: 'Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own state and that of another. Before the law and its tribunals there can be no preference of one over the other': *Hibernia Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442. This rule governs the more recent decisions." In *Woolson v. Pipher*, 100 Ind. 306, it was held that the voluntary assignment of his property by a failing debtor in the state of Ohio for the benefit of his creditors, where possession of his goods is not taken by the assignee, will not defeat the liens of attaching creditors. To the same effect is *Pitman v. Marquardt*, 20 Ind. App. 431, 50 N. E. 894.

While counsel for appellants insist that the receivers having been appointed under the law of New Jersey, vesting in them the property of the Herring-Hall-Marvin Company, "wherever situate," prior to the bringing of the attachment proceedings by appellee, that the judgment of the trial court was without evidence to sustain it. They further insist that the record shows that the receivers had taken actual possession of the property of the insolvent company before the commencement of the attachment proceedings, and that, ⁵⁶⁷ therefore, even under the rule stated in *Woolson v. Pipher*, 100 Ind. 306, requiring actual possession of the property to perfect appellants' title, the judgment must be reversed. Whether appellants had taken actual possession of the property in question before the commencement of the attachment pro-

ceedings was a question of fact to be determined by the trial court. The burden of showing the actual possession in the receivers was upon the appellants. We cannot say after reading the evidence that the finding of the trial court upon this question was without support.

It is argued by counsel for appellee that the questions discussed by counsel for appellants cannot be considered, for the reason that it affirmatively appears that all the evidence introduced upon the trial of the cause has not been made a part of the record. As in our opinion the judgment of the trial court should be affirmed, we do not further refer to the question of the completeness of the record.

Judgment affirmed.

ATTACHMENT.—A FOREIGN RECEIVER cannot assert title to property within the state, as against the attachment of a resident creditor: *Grogan v. Egbert*, 44 W. Va. 75, 67 Am. St. Rep. 763, 28 S. E. 714.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. FERGUSON.

[104 La. 240, 28 South. 917.]

CONSTITUTIONAL LAW—TITLE OF STATUTES.—The “object” of a law is the aim or purpose of the enactment, while its “subject” is the matter to which it relates and with which it deals.

CONSTITUTIONAL LAW—TITLE OF STATUTES.—If the title of an act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says that it shall embrace but one, the whole act is void, from the manifest impossibility in the court choosing between the two, and holding the act void as to one and valid as to the other.

W. Guion, attorney general, A. L. Ponder, district attorney, and L. Guion, for the appellant.

J. R. Monk, Holbert & Barrett, and W. C. Perry, for the appellees.

240 **BLANCHARD, J.** Defendants were indicted for unlawfully issuing tickets and checks redeemable only in goods and merchandise at their place of business, and not redeemable in United States currency. They were, respectively, general manager and check clerk of the Nona Mills Company, Limited, a corporation organized under the laws of the state.

The statute upon which the indictment is predicated is Act No. 71 of 1894, the title of which is: “To encourage the freedom of trade and to forbid the issuance by merchants or corporations of tickets redeemable only in goods at their own place of business.”

The first section of the act declares: “That hereafter it shall be unlawful for any person, corporation, or ²⁵⁰ firm in this

state to issue tickets or checks redeemable only in goods at their own place of business. But all such tickets shall be redeemable in United States currency, and any contract or agreement to take and receive such tickets redeemable only in goods shall be null as against public policy." The second section declares: "That any person or officers of any corporation or firm issuing such tickets shall be guilty of a misdemeanor, punishable by fine not more than one hundred nor less than twenty-five dollars, or imprisonment at not more than six months and not less than one month, one-half of said fine to go to the benefit of the informer."

The accused appeared by counsel and moved to quash the indictment on the ground of the unconstitutionality of the act. They averred its unconstitutionality in these particulars, to wit:

1. That the title of the act expresses and sets forth two or more separate and distinct objects; that the object of the act is not set forth in its title; and that the subject of the second section of the act is not mentioned or referred to at all in its title. In these respects it is claimed the act violates article 29 of the constitution of 1879 and article 31 of the constitution of 1898.

2. That the act is an attempt to regulate labor and trade, and in this respect violates article 46 of the constitution of 1879 and article 48 of the present constitution.

3. That the act restrains and abridges the freedom of contract, denies the equal protection of the laws to the persons aimed at, and thus deprives the citizen of his liberty and property without due process of law. In these respects it is asserted it violates article 2 of the constitution of 1898 and the fourteenth amendment to the constitution of the United States.

The judge a quo held the motion to quash good, sustained the plea of unconstitutionality and set aside the indictment. The state prosecutes this appeal.

Article 29 of the constitution of 1879 and article 31 of the present constitution are identical. The language is: "Every law enacted by the general assembly shall embrace but one object, and that shall be expressed in the title." The "object" of a law is the aim or purpose of the enactment: *Board of Medical Examiners v. Fowler*, 50 La. Ann. 1367, 24 South. 809. ²⁵¹ The "subject" of a law is the matter to which it relates and with which it deals: *Board of Medical Examiners v. Fowler*, 50 La. Ann. 1367, 24 South. 809; *People v. Lawrence*, 36 Barb. 192.

The general assembly, in 1894, took cognizance of the practice which had grown up, of merchants and corporations issuing tickets or checks redeemable only in merchandise at their place of business. It was considered to be against public policy to permit this, and so Act No. 71 of 1894 was enacted.

The subject matter, then, with which this law deals is, tickets redeemable only in goods at the place of business of merchants and corporations making use of same, and the practice of issuing such tickets indulged in by merchants and corporations. All will agree as to this—state and defense alike. But when it comes to the object of the act, a divergence of view appears. The state's position is that its only object is to forbid the issuance of tickets which come under the ban of the act, and that the purpose of this is to encourage freedom of trade. The position of the defense is the act discloses several distinct objects, among them one to forbid the issuance of tickets and checks, such as those described; another, to make such tickets, if issued, redeemable in United States currency; a third, to declare against public policy and void all contracts or agreements to issue and receive tickets or checks redeemable only in goods at the place of business of the persons, corporations, or firms issuing the same.

On this branch of the case, the conclusion we have reached is that the title to this act actually indicates, and the act itself actually embraces, two or more distinct objects. Thus, the title declares the law to be "an act to encourage the freedom of trade and to forbid the issuance by merchants or corporations of tickets redeemable only in goods at their place of business." Now, when we examine the body of the act we find the first part of the first section to forbid issuance of tickets redeemable only in goods by declaring the same to be unlawful, and we find all of the second section to be devoted to making this declaration effective by prescribing penalties against those who issue tickets redeemable only in goods. So, here is one complete object of the law mentioned in the title and carried out in the body of the act.

Then we find, in the concluding part of the first section of the act, ²⁵³ that which evidently was intended to foster the freedom of trade by declaring that any contract or agreement to take and receive tickets redeemable only in goods shall be null as against public policy, and that all "such" tickets (meaning tickets issued redeemable only in goods) shall be redeemable in United States currency. So, here is another complete

object of the law indicated in the title and carried out in the body of the act. To forbid the issuance of the tickets described in the law is one purpose and aim of the statute; to make all such tickets that may be issued anyhow—notwithstanding the law—redeemable in United States currency is another purpose and aim of the statute. The title of the act is not “to encourage the freedom of trade” by forbidding the issuance of tickets, etc.; but “to encourage the freedom of trade and to forbid the issuance of tickets, etc.”: See *Moore v. Police Jury*, 32 La. Ann. 1015. Therefore, the words “to encourage the freedom of trade” must relate to something in the body of the act other than that which prohibits the issuing of tickets “redeemable only in goods.” The clauses in the body of the act relating to the latter are covered by that portion of the title which follows the words “to encourage the freedom of trade.”

Now, that “something” in the body of the act (other than prohibiting the issuance of tickets) to which the words “to encourage the freedom of trade” must necessarily apply is the part declaring null, as against public policy, any contract or agreement to take and receive tickets “redeemable only in goods” and decreeing that all “such” tickets shall be redeemable in current money.

Whether the clause that “all such tickets shall be redeemable in United States currency” is an enforceable provision of the law is foreign to this discussion and to the determination of the question here at issue. It is enough to know that it is one of the declared objects of the act, indicated by the title and set forth in the body of the law. We are constrained to hold, therefore, that the act is obnoxious to the constitutional mandate that every law enacted should embrace but one object and that must be expressed in its title: *Moore v. Police Jury*, 32 La. Ann. 1015; *State v. Harrison*, 11 La. Ann. 722.

²⁵³ It is true, the courts (our own included) and the text-writers have long since settled that where a part of a statute is constitutional and a part unconstitutional, it is permissible to separate the good from the bad, the “chaff from the wheat,” the constitutional from the unconstitutional, and uphold and enforce the valid portion (if complete in itself, independent of that which is rejected and capable of being executed) while declaring void the invalid portion. And if this were an act whose title expressed only one object while the body of the act set forth two objects—where the act is merely broader than its title—it would be incumbent on the court to restrict its

declaration of the nullity of the law to that object of the act, that part of the law not indicated in the title. "But," says Judge Cooley in his work on Constitutional Limitations, page 180 (*148), "if the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says it should embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act void as to one and valid as to the other." This doctrine was expressly sustained in *Moore v. Police Jury*, 32 La. Ann. 1015, and *State v. Harrison*, 11 La. Ann. 722, cited *supra*.

Another objection urged against the constitutionality of the act under consideration is that its title limits the operation of the law to "merchants or corporations," by naming only such, while the body of the act broadens it so as to embrace "any person, corporation, or firm," and declares amenable to the penalties of the act "any person, or officers of any corporation or firm." There can be no doubt that the title of the act governs in this respect, and the law, on this ground, is unconstitutional as to all persons not embraced within the designation of "merchants or corporations": *State v. Judge*, 44 La. Ann. 90, 10 South. 400. The title of an act defines its scope; it can contain no valid provision beyond the range of the object there stated: *Sutherland on Statutory Construction*, sec. 102. Another objection urged is that the title of the act forbids the issuance only of tickets, while the body of the law makes unlawful the issuance of tickets or checks. There is little or no force in this contention. "Tickets" may well ²⁵⁴ cover and include "checks." They mean, as here used, the same thing. A check is a "ticket" in the sense of the statute.

Another objection is that the second section of the act makes the issuance of tickets in violation of the act a misdemeanor and prescribes penalties therefor, while the title of the act is altogether silent as to the penal character of the law. The contention is that to read the title of the act one would not assume it to be a criminal statute, since the title gives no indication that a new crime was being created.

There is cited, with some force and appositeness, in support of this, *State v. Baum*, 33 La. Ann. 981. We prefer, however, to rest our conclusion as to the unconstitutionality of the statute on other grounds. And we also reserve opinion on other questions raised by the defense in the case, other objections hurled at the constitutionality of the act.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be affirmed.

The chief justice and Breaux, J., concur in the decree

STATUTE, TITLE OF.—If a statute contains, and its title expresses, two or more subjects, the whole act must be void, for it cannot be known which the legislature would have preferred to omit had it known that both could not be included in the same statute: See the monographic note to *Crookston v. County Commrs.*, 79 Am. St. Rep. 456.

CAMORS v. UNION MARINE INSURANCE COMPANY.

[104 La. 349, 28 South. 928.]

INSURANCE — FORFEITURE — ENTIRETY OF CONTRACT.—Under an open marine policy of insurance containing a warranty that all risks shall be reported to the insurer as soon as known to the insured, a failure to report known risks constitutes a breach of the policy as an entirety at the option of the insurer as to all existing and future shipments, and not merely as to risks not reported.

INSURANCE — MARINE — FORFEITURE — ACCEPTANCE AFTER ARRIVAL OF CARGO OF PREMIUM on risks not properly reported, under an open marine policy of insurance containing a warranty that all risks shall be reported to the insurer as soon as known to the insured, is not a waiver of the warranty so as to estop the insurer from forfeiting the policy on a loss on the ground of previous failure to report risks promptly.

INSURANCE — MARINE — FORFEITURE.—Under a warranty in an open marine insurance policy that all risks shall be reported to the insurer as soon as known to the insured, the fact that an epidemic of sickness prevailed, and that the sickness of the clerks of the insured caused him to fail to make prompt reports of risks, does not prevent a breach of such warranty and a vacating of the policy.

INSURANCE — MARINE — FORFEITURE.—Under a warranty in an open marine policy of insurance that all risks shall be reported to the insurer as soon as known to the insured, the fact that the insurer retains notice of other risks after a loss does not estop him from insisting on a breach of the warranty, provided he has not received and retained premiums on risks reported, or done any affirmative act in respect to them.

Action for the loss of a cargo of bananas under an open marine policy of insurance containing a stipulation that it is "warranted that all risks under this policy shall be reported to Lucas E. Moore & Co., agents, as soon as known to assured." Judgment for the defendant and plaintiffs appeal.

C. J. Theard and S. Wolff, for the appellants.

Parkerson & Tobin, for the appellee.

³⁴⁹ NICHOLLS, C. J. Plaintiffs asked judgment against the defendant company upon an open marine policy of insurance for the sum of three thousand nine hundred and twenty-two dollars and seventy-seven cents, with legal interest from 14th of July, 1898, until paid, for the loss of a cargo of bananas. They alleged that on the 29th of October, 1896, the defendant entered into a written contract of insurance with them, bearing the, its corporation, number 423. That under said contract and otherwise the defendant bound itself to them, among other things: To insure and reimburse petitioners against any loss which they ³⁵⁰ might sustain by the destruction of any cargo of bananas and other goods and merchandise mentioned in said policy or contract of insurance from any of the causes mentioned therein.

It is stipulated in said contract or policy of insurance, which was of the kind commonly known and described as an open policy, that all cargoes of bananas coming to petitioners from Bocas del Toro were insured by the defendant corporation for the account of petitioners, to the amount of fifty cents per stem or bunch. That said insurance was to attach and cover all cargoes consigned to petitioners from the time when the goods and merchandise were laden on board any steamer coming from Bocas del Toro and other points, until the said goods and merchandise were discharged and safely landed at Mobile or New Orleans, according as the goods were consigned to petitioners at one or the other point, and the insurance was to so attach and cover the goods and merchandise, without notice of the consignment being given the defendant corporation or its agents at the time of the landing, but it sufficed if such notice was given sometime thereafter. The time being fixed by the well-known custom and usages of the fruit trade at the port of New Orleans, which custom and usage was well known to the defendant corporation, and by the terms of the contract and the course of business which had grown up thereunder between petitioners and the defendant corporation, and the time being so fixed, by all the hereinbefore mentioned circumstances, was after the arrival and unloading of the vessel carrying the cargo, at the port of destination. That it was further stipulated that upon said notice being given to the defendant corporation it would charge petitioners and collect from them the premiums

due on the value of the cargo, as shown by the given notice, and it was the custom of the said defendant corporation and its agents to collect at the end of the month, or shortly thereafter, all the insurance premiums which had accumulated during the month. That since the issuance of the described and mentioned policy of insurance on the twenty-ninth day of October, 1896, they had faithfully lived up to every obligation which they had assumed toward the defendant corporation. That up to the nineteenth day of November, 1898, petitioners had faithfully and as promptly as was required by the course of business which had been adopted by the defendant corporation in dealing with petitioners reported each cargo consigned to them, and the same was ³⁵¹ noted by the defendant corporation and the premiums collected thereon from petitioners. That the total amount of premiums so paid by petitioners to the defendant corporation from the date said policy was written, until November, 1898, amounted to ten thousand seven hundred and sixty-one dollars and fifty-nine cents, and that all of the cargoes upon which these premiums were paid were reported after the safe arrival of the vessels and cargoes at the port of destination, and after all risk and hazard were at an end.

That on the thirtieth day of October, 1898, the steamship "Phoenix" left Bocas del Toro, bound for the port of New Orleans, with a cargo of bananas, rubber, and gold, consigned to petitioners, and on or about the fourth day of November, 1898, the said steamship was wrecked by a hurricane, and the said vessel and cargo abandoned by the master and crew of the vessel, all of which was, with greater certainty, shown by an annexed protest made in accordance with maritime law by the master and other officers of said steamship on the fourteenth day of November, 1898, at the city of Mobile, Alabama, before Henry Hanan, a duly authorized notary of said city. That, in consequence of this disaster to the said steamship, the bananas on board thereof, consigned to petitioners, were totally lost and destroyed, and the loss so occurring was a loss within the terms of the policy described, which policy was at the time mentioned in the petition in full force and effect. That they had duly presented to the defendant corporation their claim for the loss hereinbefore described, but it delayed acting thereon until the third day of January, 1899, nearly two months after the claim had been made and presented, and then the said defendant corporation refused to pay their claim. That the cargo of bananas so totally lost and destroyed, consisting of

nine thousand and eighty-three bunches or stems, was well worth forty-five cents per stem, or four thousand and eighty-seven dollars and thirty-five cents, but from this sum should be deducted the premiums due on the following cargoes:

Premium on cargo—steamship “Tyr” ...	\$26	68
Premium on cargo—steamship “Espana”.	50	62
Premium on cargo—steamship “Condor”.	25	31
Premium on cargo—steamship “Tyr” ...	29	32—\$4,087
Premium on cargo—steamship “Phoenix”	30	65 164
		58

Leaving the net amount due petitioners.....\$3,922 77

³⁵³ That under the terms of the existing contract this amount was due and payable on the fourteenth day of November, 1898, and amicable demand had been made in vain.

Defendant answered, first pleading the general issue. It admitted that it had issued in favor of the plaintiffs its policy No. 423, which policy was that commonly known as an “open marine policy.” That said policy contained, among others, the express warranty that all risks under the policy should be reported to Lucas E. Moore, agent, as soon as known to assured. That it was not liable to plaintiffs in any sum whatever, because the plaintiffs violated the express warranty above set out, and without which the policy would not have been issued, in this: That plaintiffs frequently failed to report risks, as stipulated, among others as follows: “Steamship ‘Condor,’ No. 2, October 7th; steamship ‘Espana,’ No. 5, October 10th; steamship ‘Tyr,’ No. 3, October 11th; steamship ‘Espana,’ No. 6, October 24th; steamship ‘Condor,’ No. 3, October 25th; steamship ‘Tyr,’ No. 4, October 29, 1898.” That said risks were known to the plaintiffs on and before the dates hereinabove set out, but were not reported to defendant. That said failure of plaintiffs to report said risks was a breach of the warranty, so specially stipulated, upon the good faith of which the contract was made, and an avoidance of the policy. That all of said risks were known to the plaintiffs prior to the loss of the steamship “Phoenix,” complained of in the petition, and by reason of the failure of plaintiffs to report said risks at the time of the loss of said steamship the warranty had been violated; the policy was not in force, and defendant was not liable for the loss. The district court rejected plaintiffs’ demand, and they appealed.

The policy upon which plaintiffs declare reads as follows:

"Whereas it hath been proposed to the Union Marine Insurance Company, Limited, by Messrs. J. B. Camors & Co., as well in their own name as for and in the name of all and every other person or persons to whom the subject matter of this policy does, ³⁵³ may, or shall appertain in part or in all to make with the said company the insurance hereinafter mentioned and described.

"Now, this policy witnesseth: That in consideration of the said person or persons effecting this policy, promising to pay to the said company the sum of various amounts as a premium at and after the rate of.....as agreed.....per cent for such insurance, the said company takes upon itself the burden of such insurance to the amount of fifty cents per stem of bananas from Bocas del Toro; forty cents per stem of bananas from Honduras.

"And promises and agrees with the insured, their executors, administrators, and assigns, in all respects truly to perform and fulfill the contract contained in this policy.

"And it is hereby agreed and declared that the insurance shall be and is an insurance (lost or not lost) at and from British and Spanish Honduras and the United States of Colombia to New Orleans and Mobile.

"And it is also agreed and declared that the subject matter of this policy as between the insured and the said company, so far as concerns the policy, shall be and is as follows: Upon bananas, cocoanuts and oranges.....also to cover such other risks as may be accepted and indorsed by Lucas E. Moore & Co., agents, upon the book attached to this policyin the ship or vessel called the steamers, including all risk of craft and boats to and from the said ship or vessel. Each craft or lighter to be deemed a separate insurance.

"And the said company promises and agrees that the insurance aforesaid shall commence from the time when the goods and merchandise shall be laden on board the said ship or vessels, craft, or boat, as above, and continue until the said goods and merchandise be discharged and safely landed as above."

Written across the policy in ink are the words: "Warranted that all risks under this policy shall be reported to Lucas E. Moore & Co., agents, as soon as known to assured."

This policy was attached to a book which was usually in the possession ³⁵⁴ of Lucas E. Moore & Co., in which they entered

from time to time the risks covered by the policy with details as, for instance:

Date.	On what.	Vessel.	Voyage		Sum insured.	Rate.	Premium.
			From—	To—			
Sept. 23, 1898.	8,000 bunches bananas.	Tyr. No. 2.	Bocas del Toro.	New Orleans.	\$8,600.00	$\frac{3}{4}$	\$27.00

The bills for premium were made out monthly by the defendants, sent to plaintiffs and paid by them.

We find in the record a number of reports or notices, of which the following is one:

"Please Insert Amount of Invoice.

"Lucas E. Moore & Co., Agents of the Thames and Mersey Insurance Company, Limited; Union Marine Insurance Company, Limited.

"Please Enter Open Marine Policy No. —

On what.	Name of vessel.	From—	To—	Amount invoice.	Amount insured.	Rate.	Premium.
12,100 bunches bananas.	Condor No. 2.	Bocsa.	N. O.	\$5,445.00.	$\frac{3}{4}$	\$40.84.

"Not covered if stored.

"Approved.

"New Orleans, November 7, 1898.

"Signed. J. B. Camors & Co.

"Applicant."

No allusion is made in the policy otherwise than in the warranty clause heretofore copied. The rate of premium is not mentioned therein; it is only referred to "as agreed." The petition does not state the rate.

The steamer "Phoenix" left Bocas del Toro, bound for the port of New Orleans, with a cargo of bananas, rubber, and gold, consigned to plaintiffs, and on or about the 4th of November, 1898, the ship was wrecked by a hurricane and the vessel and cargo abandoned by the master and crew. Plaintiffs reported the loss to the defendant's agents on the twelfth day of November, 1898. On the same day plaintiffs reported the steamship "España" due to unload some eleven thousand bunches at 5 o'clock that evening. On the 19th of November, 1898, Lucas E. Moore & Co., stating that they would be obliged if plaintiffs would furnish them with a list of all their fruit, cargoes, and dates of arrival at New Orleans and Mobile during the last six months, plaintiffs furnished the list between May ³⁵⁵ 10, 1898, and October 29, 1898, on the 19th of November, 1898. At the same time (November 19, 1898) there were sent to defendant reports of two cargoes which had arrived on, respectively, the 7th and the 10th of October, 1898, being steamship

"Condor," No. 2, and "Espana," No. 5. These reports were dated on the day they were sent (November 19, 1898), but they were returned to plaintiffs so that they could be dated the date of their arrival, or within a few days thereafter. It is claimed by the defendants that in addition to those two cargoes, plaintiffs failed to report those arriving as follows: Steamship "Tyr," No. 3, October 11th; steamship "Espana," No. 6, October 24th; steamship "Condor," No. 3, October 25th; steamship "Tyr," October 29th.

After the report of the loss of the "Phoenix," all cargoes consigned to the plaintiffs during November and December up to January 3, 1899, were reported to the defendants. They were: Steamship "Espana," No. 9, arrived November 12, reported November 15, 1898; steamship "Joseph Oteri," No. 11, arrived November 13, 1898, reported November 15, 1898; steamship "Espana," No. 10, arrived December 8, 1898, reported December 12, 1898; steamship "Franklin," No. 1, arrived December 21, 1898, reported December 22, 1898.

On the 3d of January, 1899, defendant's agents wrote to the plaintiffs saying: "Referring to your claim for total loss of bananas, per steamer 'Phoenix,' we beg leave to say that we are in receipt of a cable from the Union Marine Insurance Company, Limited, instructing us not to pay the loss because of your omitting to declare risks under your policy during the month of October." This suit followed. The defense set up is not in respect to any matter connected with the cargo on the steamship "Phoenix," or the loss thereof, but a claim that the general open policy has been forfeited by the failure of the plaintiffs to declare risks under that policy during the month of October, 1898, and therefore the cargo on that particular steamship was never insured. Both sides admit that all cargoes consigned to the plaintiffs, either at New Orleans or Mobile, from certain points mentioned in the ³⁵⁶ policy, were covered or insured from the moment of the shipment, though neither the assured nor the insurer knew of the shipment.

George C. Bright, in charge of the insurance department of the business of Lucas E. Moore & Co., being upon the stand as a witness for the defendant, and interrogated as to the course of business between the parties, in connection with the book and policy of insurance, testified that the course of dealing between Lucas E. Moore & Co., agents of the Marine Insurance Company, and J. B. Camors & Co., was that they were to be held covered on all cargoes of fruit coming into the

ports of New Orleans and Mobile; it was understood that they couldn't report their risks, of course, before they knew them, but as soon as they did know them they were to report them. Their method of making these reports, it was well understood, was based upon the number of bunches discharged from the ship, and as soon as the ship was discharged and each bunch was inserted at a certain price, the entries in the book were mostly made by witnesses, some by clerks in the office; they were based upon the application which J. B. Camors & Co. sent to Lucas E. Moore & Co. from time to time. Witness had no particular means of ascertaining when the reports should come in, nevertheless he had noticed on one and possibly another occasion that Camors & Co. had not promptly made their reports according to the contract. Witness saw Mr. Victor Camors and urged upon him the seriousness of his neglect if he did not report the risks promptly; he particularly called his attention to his contract, and he told witness that he fully intended to make prompt reports. He stated that on the 19th of November, 1898, suspecting that Camors & Co. had not turned in all their declarations, witness wrote them a letter and asked them to give him a memorandum of the last six months of all risks they had; they sent that memorandum and accompanying it were two declarations, one dated November 19, 1898, on the "Condor," No. 2, and one dated November 19, 1898, on the "Espana," No. 5.

In each case he looked up these vessels and found out that they had arrived more than a month before, and witness sent these declarations back to Camors & Co. by the boy, telling him to tell them that this was not right, and that these declarations should have been dated the day of the ship's discharge or within a few days thereof, as soon as the bananas were counted. The man who made out these declarations then re-dated them correctly in red ink; witness told the boy to have Mr. Camors put them down in red ink (they were at first in black ink), ³⁵⁷ to write the right dates when these declarations should have been made, and the boy had it done; the one on "Condor," No. 2, being re-dated October 7th, and the second, "Espana," No. 5, being re-dated October 10th. Witness had not seen these two shipments down anywhere at all on the lists furnished to the court. The two declarations were filed in evidence. In connection with it counsel filed a declaration of Camors & Co. of October 7th, on the "Espana," of the same date on "Phoenix," No. 4; another of October 10th on "Con-

dor," No. 3, and another of October 18th on the "Phoenix." These declarations were introduced over plaintiffs' objection (and under bill of exception) that defendants' proof should be confined to failure to report the five or six vessels in controversy.

Defendant introduced in evidence plaintiffs' notice of October 11th of the "Tyr" No. 3; of October 24th of the "Espana," No. 6; of October 25th of "Condor," No. 3; of October 29th of "Tyr," No. 4; of November 14th of the "Phoenix," No. 6. These notices were not entered in the book; witness could not remember when they were received at the office; he was in the office on all these dates; it was the custom of Lucas E. Moore & Co. to enter up notices in the book within a very reasonable time; witness was in New Orleans from October 11th to about October 19th; from the 19th of October to the 8th or 9th of November he was away.

In this statement as to the course of business and the time of giving notice of shipments the plaintiffs concur. The evidence shows that on the 30th of October, 1898, the steamship "Phoenix" left Bocas del Toro, bound for the port of New Orleans, with a cargo of fruit, and that on or about the 4th of November, 1898, she was wrecked in a hurricane and the vessel and cargo abandoned by the master and crew. The cargo was unquestionably insured under the policy declared on if it was in existence at the time of the wreck.

The defendant contends that it was not then in existence; that the policy had been forfeited by a breach of warranty; that the breach of warranty is claimed to have consisted in failing to report a number of risks which were known to them—this prior to the loss of the "Phoenix." The evidence shows that several cargoes of fruit, consigned to the plaintiffs and covered by defendant's policy of insurance, arrived at the port of New Orleans in the early part of October, 1898, and were ~~was~~ discharged and not reported then; that others arrived and were discharged in the latter part of October and were reported to defendant. Defendant contends that the holding so long back of the earlier cargoes, followed by reports of later cargoes, was intentional and designed to escape the payment of premiums to them, and that the facts of the case would never have been known had not the loss of the "Phoenix" occurred.

The plaintiffs do not deny the fact that such reports were delayed and not reported until after later cargoes had been reported, but they deny that it was intentional, and assert that

it was due to the prevalence of yellow fever in New Orleans at the time and to the sickness of their clerks who were charged with this particular duty; that mistakes of this kind had occurred before and been corrected, being recognized to be mistakes, and that the defendant had repeatedly collected premiums on cargoes so tardily or erroneously reported, and that the warranty clause was substantially abrogated between the parties, waived, and ignored. That the policy being an open, running, or floating policy, each cargo was the subject of a separate insurance; that the warranty clause applied only to each separate cargo, and that the effect of a breach of the warranty in respect to a particular cargo extinguished the insurance on that particular shipment, but left the general policy alive as to other then existing insurance on other cargoes and as to future shipments.

Plaintiffs further contend that notwithstanding defendant knew of the facts on which they predicate their discharge from liability, they gave no notice to them that they held the policy to have been terminated, but continued thereafter to receive, without objection, notices of later shipments, and permitted plaintiffs, on the faith and strength of their belief of the continued existence of the policy, to leave these later shipments uncovered in other companies, and that by such conduct they had waived the forfeiture of the policy if it had, in fact, become vacated.

Construing the warranty clause, as both parties concur in construing it, as not bringing about a forfeiture of the policy by tardiness of reports where cargoes have arrived safely in port, and some time has been taken in ascertaining the extent of the same, the clause would be of little value to the defendants were we to hold that it applied and attached only to each separate shipment, and by its breach vacated ³⁵⁹ only the insurance upon the particular shipment, with respect to which the breach occurred.

As both parties concur in the proposition that mere knowledge by the plaintiffs of the fact that particular shipments were at sea does not enter as a factor as affecting the question of a breach of warranty, the practical result would be to reduce the warranty clause upon the policy to the giving to the insurer, in case of the loss of a cargo, prompt notice of the loss and of claim. We do not think the scope of the clause should be so restricted and narrowed. We think it contemplated a broader protection to the insurer than this and entitled him, should he,

on account of a delay in reporting or an entire omission to report a particular shipment, believe the assured was not acting in good faith, to at once avail himself of this breach of the warranty and vacate at once the whole policy.

Plaintiffs claim an abrogation or waiver of the warranty clause as arising from the fact that upon a number of occasions where they had failed to make reports as promptly as they should, or by some inadvertence they had omitted to make reports in the regular order of shipments, the defendant had none the less charged and collected premiums upon the shipments. The cases referred to were all cases where the cargoes had arrived safely, and the shippers recognizing liability under the policy had tendered payment of the premium. It could scarcely be expected that the insurer would refuse to receive payment under such circumstances, but is thoroughly illogical to infer from the fact of such acceptance a relinquishment on his part of the right to deny his own liability in case of a loss, by reason of a breach of warranty. Warranty is inserted in the policy in the interest of the insurer; he may waive or he may insist upon it, as he elects, in any given case.

Plaintiffs claim that their failure to make reports was due to the sickness of their clerks. If there was in fact breach of warranty, that fact carried the vacating of the policy independently of the reasons therefor.

Plaintiffs contend that the retention, without objection by the defendant, of notices of shipments subsequently made by them, was a waiver of the prior breach of the policy.

If the defendant, knowing of the facts authorizing a vacation of the policy, and intending to claim said vacation, had failed to duly notify the plaintiffs to that effect, and retained, without objection, notices of ~~soo~~ subsequent shipments, plaintiffs would have had strong ground for urging the particular contention we are now considering, if those special shipments had been lost. That, however, is not the case before the court. None of the subsequent shipments have been lost, nor has the defendant entered the same upon the policy book, or charged or received premiums upon the same, or done any affirmative act, in respect to them. The cargo in this case was lost, and the policy vacated prior to the fact on which this alleged waiver is based.

We have said that where there has been a breach of warranty in respect to one shipment, the insurer may avail himself of that breach to vacate the whole policy as to all existing and

future shipments; as a matter of course, the particular breach so sought to be made use of must not have been itself waived.

For the reasons assigned, the judgment appealed from is hereby affirmed.

Rehearing refused.

MARINE INSURANCE—CONCEALMENT AND WARRANTY.—If the insured under a policy of marine insurance undertakes to state all the circumstances that can affect the risk, he must do so fully and fairly: *Stoney v. Union Ins. Co.*, 8 McCord, 387, 15 Am. Dec. 634. Warranty in such a policy, being in the nature of a condition precedent, must be fulfilled by the insured before he can recover on the contract: *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. 673, 16 Am. Dec. 460.

STATE v. JOHNSON.

[104 La. 417, 29 South. 24.]

CRIMINAL LAW—DEGREE OF PROOF.—There is no principle of law which requires, authorizes, sanctions, or approves the proposition that "the greater the crime, the stronger is the proof required for conviction."

CRIMINAL LAW—INDICTMENT.—The word "their" preceding "malice aforethought" in an indictment charging two or more persons with murder is sufficient. It is not necessary to use the word "defendants" in such place in the indictment.

CRIMINAL LAW.—RULING DENYING CHANGE OF VENUE, unless brought up by bill of exceptions, cannot be reviewed on appeal.

R. E. Belden and E. N. Cullom, for the appellants.

W. Guion, attorney general, J. Moore, district attorney, P. A. Sompayrac, A. R. Mitchell, and L. Guion, for the appellee.

⁴¹⁷ BLANCHARD, J. Defendants were jointly indicted for the murder of Paul M. Sloane, tried together by jury, found guilty without capital punishment, and from a sentence of penal servitude for life prosecute this appeal. ⁴¹⁸ Separate counsel represented the accused.

At the conclusion of the regular charge to the jury counsel for Ross Johnson requested the judge to charge additionally as follows: "That the fouler the crime is, the clearer and the plainer ought to be the proof to convict. That the more flagrant the crime is, the more clearly and satisfactorily it should be made to appear to the jury. That the greater the crime, the

stronger is the proof required for conviction." The judge declined to so charge, and a bill of exceptions was taken.

We have been referred to no law or precedent which requires, authorizes, sanctions, or approves the propositions advanced, or the distinctions in criminology sought to be made. There was no error in the ruling of the judge.

Counsel for William Pate, and on his behalf, filed a motion in arrest of judgment on the following grounds, to wit: "1. The indictment is insufficient in not charging that defendants killed and murdered Paul M. Sloane; 2. The indictment is defective in not charging that the defendants did kill and murder Paul M. Sloane; 3. The indictment is defective inasmuch as the necessary ingredient of malice is not properly alleged." The motion was overruled and a bill taken.

The argument of counsel is, the indictment does not contain the words "defendants did willfully, feloniously, and of defendants' malice aforethought kill and murder one Paul M. Sloane," etc.; that the word used in place of "defendants" is "their."

It is urged that nothing but the letter of the law will answer, and that the word "their" cannot be taken by intendment, or implication to mean "defendants," or "for defendants." In support of this the court is referred to Rev. Stats. 1047; State v. Jones, 45 La. Ann. 1455, 14 South. 218; State v. Washington, 48 La. Ann. 1362, 20 South. 911.

The bill of indictment charges "that Ross Johnson and William Pate, alias William Daniels, . . . did maliciously, willfully, feloniously, and of their malice aforethought kill and murder one Paul M. Sloane," etc. The contention made on behalf of the accused Pate would require it, under pain of insufficiency, to read as follows: "That Ross Johnson and William Pate, alias William Daniels, . . . ⁴¹⁹ as defendants did maliciously, willfully, feloniously, and of defendants' malice aforethought kill and murder one Paul M. Sloane," etc.

The statute (Rev. Stats. 1048) declares: "It shall be sufficient in every indictment for murder to charge that the defendant did feloniously, willfully, and of his malice aforethought kill and murder the deceased." Testing it by the statute, the indictment in this case is entirely sufficient. The word "their," preceding "malice aforethought," where two or more persons are charged with the murder, or the word "his" preceding "malice aforethought," where one person is charged with the crime, suffices. Neither is it necessary, or

preferable as a matter of concise expression, to use the word "defendants" or "as defendants" immediately preceding the words "did willfully, feloniously," etc. Their use would add nothing in the way of aptness, clearness, description, or force to the indictment. The authorities to which we have been referred, mentioned *supra*, do not at all sustain the contention of counsel.

A motion for a change of venue appears to have been made on behalf of both defendants. Testimony was taken therein and is copied in the record. The motion was overruled, but no bill of exceptions to this ruling was taken. A bill was necessary, and the evidence has no proper place in the record except as brought up by a bill of exceptions, annexed to or made part thereof: *State v. Williams*, 30 La. Ann. 1028; *State v. Daniel*, 31 La. Ann. 91. It is not considered, therefore, that anything relating to this motion for change of venue or the testimony taken is before the court.

Such, too, we take it, is the view of counsel for the accused, for neither makes any mention of the motion in briefs filed.

Judgment affirmed.

Rehearing refused.

APPEAL.—CHANGE OF VENUE in a criminal case is discretionary, and a refusal thereof cannot be assigned as error: *Findley v. State*, 5 Black, 576, 36 Am. Dec. 557; *Sumner v. State*, 5 Black, 579, 36 Am. Dec. 561. But see *Cheatham v. State*, 67 Miss. 335, 19 Am. St. Rep. 310, 7 South. 204; *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129, 39 S. W. 554.

STATE v. WASHINGTON.

[104 La. 443, 29 South. 55.]

PARENT AND CHILD.—CRIMINAL LAW—PUNISHMENT OF CHILD.—Whether a parent who inflicts corporal punishment on a child is acting in good faith, prompted by parental love without passion, is a matter to be determined largely from the character of the injuries received by the child, and any instructions which lead to the conclusion that it is incompetent for the jury to differ from the parent as to whether the latter had gone too far would be misleading and erroneous.

CRIMINAL LAW—INDICTMENT—PROOF.—Under an indictment for the "willful and malicious infliction with a dangerous weapon, or with intent to kill, of a wound less than mayhem," charging the infliction of such wound with a dangerous weapon

consisting of "a piece of iron," it is not essential to the crime that the wound should have in fact been inflicted with the particular weapon specified, and if it is proved without objection that the wound was willfully and maliciously inflicted with a dangerous weapon of another kind, such proof is sufficient to sustain the indictment.

CRIMINAL LAW—APPELLATE PRACTICE.—The denial of a motion for a new trial on the ground that the verdict is contrary to the evidence and the law, without specification of error or bill of exceptions thereto, cannot be reviewed on appeal.

CRIMINAL LAW—ARREST OF JUDGMENT.—A defect in an indictment that appears only by the aid of testimony cannot be made the subject of a motion in arrest of the judgment.

Barksdale & Barksdale, for the appellant.

W. Guion, attorney general, T. F. Preaus, district attorney, and L. Guion, for the appellee.

⁴⁴³ **MONROE, J.** Defendant, indicted for inflicting a wound less than mayhem, was convicted of assault and sentenced to pay a fine of twenty dollars, or, in default of payment, to confinement in jail and work on the public roads. He has appealed, and through his counsel ⁴⁴⁴ presents for the consideration of this court certain bills of exception and motions which will now be considered.

1. Bill of exception No. 1 is to the refusal of the court to charge that "if a parent acts in good faith, prompted by true parental love, without passion, inflicts no permanent injury on the child, he could not be punished merely because the jury, reviewing the case, do not think it was wise to proceed so far." The reasons of the judge for refusing to give the charge as requested are stated as follows, to wit: "The court had charged the jury already that a parent had a right to chastise his child, but that the chastisement should be done in moderation, and when the correction was considered reasonable, the parent was to be considered blameless." The facts in the case disclosed that the father had beaten his ten year old child with a switch and a walking cane to the extent that many permanent scars were visible on the child's body, and the court considered that the chastisement in the case was not from "(parental love), but from brutal instincts and malicious purposes."

We are of opinion that the charge, as given by the judge, was better calculated to enlighten the jury as to the law applicable to the facts stated without the special charge requested than with it. Whether a parent who inflicts corporal punishment on a child is acting "in good faith, prompted by parental love without passion," is a matter which may be determined largely

from the character of the injuries received by the child, and any instructions which would lead to the conclusion that it would be incompetent for the jury to differ from the parent as to whether the latter had gone too far would be misleading.

2. Bill of exception No. 2 is to the refusal of the court to charge that "the state in this case must show, beyond a reasonable doubt, that the wound was inflicted with the weapon named in the bill of indictment, viz., a piece of iron, and the piece of iron, when used as a weapon, was dangerous." The bill recites that this charge was refused, and that the court charged "that it would be sufficient if the state had proved that a wound had been inflicted with any dangerous weapon." The reasons given by the judge for the ruling complained of are that "the defendant permitted the state to prove without objection that the wound had been made with a switch and a walking cane, and the court considered the evidence supplied pleading, and charged the jury as above stated."

The statute under which the indictment was found (Act No. 17 of 1888) reads: "Whoever shall willfully and maliciously, with a dangerous ⁴⁴⁵ weapon, or with intent to kill, inflict a wound less than mayhem," etc. The indictment went further and specified that the weapon used was a piece of iron. It is plain, however, that, in the contemplation of the law, the crime could have been as well committed with a piece of brass or a stick, or any other instrument or thing capable of producing the same effect, which, either of itself or by reason of its use, should be held to be a dangerous weapon. It is true that objection might have been made on the ground of "variance" to the introduction of evidence tending to show the use of any other instrument than that specified in the indictment, but it is by no means clear that such an objection should have been sustained. "In all cases," says Mr. Bishop, "it is simply required that the proof sustain so much of the allegations as constitutes the crime to be punished. It need not cover more, though alleged": 1 Bishop's Criminal Procedure, par. 127.

"In an indictment for murder, an allegation that the death was produced with a knife will be supported by proof that it was produced by a dagger, sword, staff, or the like, or any instrument capable of the same effect": Wharton's Criminal Evidence, par. 143.

Whether the weapon used by defendant was dangerous within the meaning of the statute was a question for the jury to determine, upon considering not only the character of such

weapon, but by whom, upon whom, and in what manner it was used: *State v. Scott*, 39 La. Ann. 943, 3 South. 83; *State v. Brown*, 41 La. Ann. 345, 6 South. 541.

Inasmuch, therefore, as the defendant had allowed it to be proved without objection that the wounds had been inflicted with something else than a piece of iron, there was no reason for giving the special charge requested by him, which was, in effect, that the jury should disregard the proof so made.

3. A motion for new trial was filed, upon the ground that the verdict was contrary to the law and evidence, but as no particular error of law is specified and no bill of exceptions was taken, we do not feel called upon to consider it: *State v. Nelson*, 32 La. Ann. 842; *State v. Wire*, 38 La. Ann. 684; *State v. Walker*, 37 La. Ann. 560; *State v. Miller*, 36 La. Ann. 158; *State v. Chandler*, 36 La. Ann. 178; *State v. Darrow*, 39 La. Ann. 677, 2 South. 387; *State v. Pete*, 39 La. Ann. 1096, 3 South. 284; *State v. McTier*, 45 La. Ann. 440, 12 South. 516.

4. Defendant's counsel also filed a motion in arrest of judgment, upon grounds which are stated as follows, to wit: "Under and by the evidence adduced at the trial of this cause, which is a necessary part of the record of this cause, and which was heard by the court, it was shown ⁴⁴⁶ that this defendant was the father of the party alleged to have been injured—namely, Julia Washington, a child ten years old. Under the law, the father had the right to assault and whip his child, provided it be (in) a reasonable manner, and while the father might be guilty of assaulting and beating his child, or of assault with intent to commit a graver crime on his child, when the jury simply find the father guilty of an assault, it is finding him guilty of an act which is not illegal in him and for which he cannot be punished."

Our attention has not been called to the law which makes all of the evidence adduced on the trial part of the record of appeal in a criminal case, and frequent rulings have been made by this court which are irreconcilable with that theory: *State v. Nash*, 45 La. Ann. 974, 13 South. 265; *State v. Joseph*, 45 La. Ann. 903, 12 South. 934. Beyond this, it has been held more than once that a "defect that appears only by the aid of testimony cannot be the subject of a motion in arrest": *State v. Green*, 36 La. Ann. 185; *State v. Chandler*, 36 La. Ann. 177; *State v. Chevis*, 48 La. Ann. 576, 19 South. 557; *State v. Pete*, 45 La. Ann. 1095, 3 South. 284; *State v. Victor*, 36 La. Ann. 978; *State v. White*, 52 La. Ann. 206, 26 South. 849.

It does not appear from the indictment in the case at bar that the defendant was the father of the person injured; that fact could, therefore, have been arrived at only "by the aid of testimony," and the point as presented falls within the rule as stated above, in language quoted from the opinion in *State v. Green*, 36 La. Ann. 185: See, also, 1 Bishop's Criminal Procedure, par. 1285.

The trial judge heard the evidence, and in that way learned the facts in regard to the relationship between the defendant and the person injured, which he states in the bills of exception signed by him, which bills were, however, taken with reference to other matters than that now under consideration. And if it be true that a motion in arrest cannot be sustained on the basis of direct evidence introduced into the transcript, a fortiori can such motion not be sustained on the basis of statements of fact contained in bills of exception incorporated in the transcript, but relating to other matters.

Judgment affirmed.

ASSAULT.—A PARENT'S CORPORAL CHASTISEMENT of his child, however severe and unmerited, will not be punished criminally as excessive or cruel, if it was honestly inflicted without malice, and did not produce permanent injury: *State v. Jones*, 95 N. C. 588, 50 Am. Rep. 282. But see the note thereto.

NEW TRIAL.—AN APPELLATE COURT will not revise the refusal of the lower court to grant a motion for a new trial, based solely on an alleged deficiency of evidence to make out the case: *State v. Deschamps*, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 South. 703. See, too, *State v. White*, 34 S. C. 59, 27 Am. St. Rep. 783, 12 S. E. 661.

McGILLIARD v. DONALDSONVILLE FOUNDRY AND MACHINE WORKS.

[104 La. 544, 29 South. 254.]

RECEIVERS—STOCKHOLDER AS.—The appointment of a receiver for an insolvent corporation cannot be avoided on the bare ground that the person appointed is a stockholder in such corporation, and has been negligent as such, or that he is a nonresident of the parish, when the latter issue is not raised by the pleadings.

RECEIVERS—STOCKHOLDER AS.—The appointment of a receiver should stand until it is made evident that he is not a proper person, and, ordinarily, the fact that he is a stockholder or has an interest in the receivership property is a recommendation that he will guard the interests of his fellow-stockholders and creditors as well as his own. It cannot be assumed that the receiver appointed is not a proper person simply and exclusively because he is a stockholder.

RECEIVERS—REMOVAL—To induce an appellate court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is generally necessary to show some overwhelming objection in point of propriety, or some fatal objection upon principle in the person named.

RECEIVERS—REMOVAL—Creditors who have admitted the necessity of an appointment of a receiver, and who have made application for another appointment than that made, cannot urge successfully that the proceedings for the prior appointment are null, because of defect or insufficiency in the pleadings.

E. Maurin, for the appellants.

R. McCulloh, for the appellees.

545 BREAUX, J. This is a suit brought by two stockholders and a creditor of the Donaldsonville Foundry and Machine Works, Limited, for the appointment of a receiver to take charge of the property and business of the corporation, which appointment is opposed by the intervenors and appellants, creditors of the corporation.

It seems that at a meeting of the board of directors of this company held on the twenty-seventh day of June, 1900, a resolution was adopted setting forth that the corporation was unable to meet its obligations, and asking that M. M. Neams, one of the petitioners for the appointment of a receiver, be appointed to that position. The other petitioner is William McGilliard. The creditor who also petitions for this appointment is the Ramsey and Sickemeier Company, a corporation domiciled in Missouri.

These petitioners for the appointment of a receiver charge that for some time past their rights as stockholders and creditors, respectively, of the Donaldsonville Foundry and Machine Works, Limited, have been exposed to total loss by the bad management of its officers; that they contracted many debts aggregating a comparatively large amount beyond the ability of the corporation to meet; that the officers conceal the amount of the indebtedness of the corporation; that at least one of its drafts was protested, and that in consequence of its embarrassed condition the business of the company has greatly suffered; that despite all this the officers are contracting new debts; that the indebtedness already amounts to about ten thousand dollars and absolute insolvency is bound to ensue, unless a change is brought about through the instrumentality of the courts. At the instance of petitioners proper service was made on the corporation of demand for it to show cause why M. M. Neams should not be appointed receiver. The petition for

the appointment is sworn to by the oath of petitioner's attorney. Roberts & Co., a commercial firm, and Stream and Gibbens, both creditors of the corporation, filed an intervention praying that a disinterested person be appointed; that some one be appointed who has no interest in the corporation.

The testimony admitted on the trial of the rule shows that since about two years the management had not been satisfactory to the directors and the shareholders. Insolvency was the threatened condition, as the amount of the debts was nearly equal to the amount of the assets. But we will not dwell upon the subjects of mismanagement and insolvency for the reason that they are not formally denied. All ⁵⁴⁶ concerned agree in averring that the condition calls for the appointment of a receiver. The board of directors unanimously adopted a resolution requesting the court to appoint M. M. Neams.

We have seen that appellants also ask for the appointment of a receiver, but stoutly oppose the appointment of M. M. Neams, one of the appellees, who is one of the stockholders. The grounds of the opposition to this appointment are that his appointment will be detrimental to the interests of the creditors; that he, being interested as a stockholder, will have an eye to his own interest and not to those of the creditors; that he has entered into an agreement with the stockholders of the corporation to secure his appointment adversely to the creditors. These are the allegations of the intervenors. No evidence was introduced to sustain them except of the mere fact that M. M. Neams is a stockholder. This, of itself, is not sufficient to render him incompetent to discharge the duties of receiver.

The appointment of a receiver should stand until it is made evident that he is not a proper person: Hyde on Receivers, sec. 64, p. 65. Ordinarily, the fact that a receiver has an interest is a recommendation that he will safeguard the interests of his fellow-stockholders as well as his own. There may be exceptions rendering it prudent, in a business point of view, not to appoint a stockholder. This case is not brought within any exception. We will not assume, without testimony, that the one appointed is not a proper person exclusively because he is a stockholder.

He was never an officer of the corporation and there is nothing in the record giving color even to appellants' charge that, as a stockholder, he has taken part in any of the mismanagement of the corporation. We have not found in plaintiffs' petition and in the resolution of the board of directors asking

for the appointment of a receiver, to which we have already referred, the evidence of the collusion between the plaintiffs and defendants for which intervenors and appellants contend. True, one of the petitioners is the vice-president. If he has been negligent in not asserting his authority as an officer to prevent mismanagement, this in no way can affect the rights and interests of the other plaintiff who has nothing in common with coplaintiff save that they have united in a petition to obtain the appointment of a receiver. We are informed by the testimony that he is a well-known engineer and enjoys a good reputation for capacity as a mechanic and integrity as a man. It is urged by the appellants that he is not a bookkeeper or ⁵⁴⁷ accountant. This objection is completely met by the proof that he is intelligent and has been fairly successful in business.

The court is charged to see to the proper administration of the affairs of this corporation. It has selected this receiver as its agent. In this selection it must be vested with some discretion which should remain undisturbed when it has been exercised unless it be manifest that an error has been committed. "And it may be asserted as a general rule that, to induce an appellate court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is necessary to show some overwhelming objection in point of propriety, or some fatal objection upon principle in the person named": Hyde on Receivers, 3d ed., sec. 65, p. 67.

There are no great disputes between the parties, as we take it, but even in case of great dispute, there is support for holding that the fact that one of the parties in interest and to the dispute has been appointed receiver does not afford ground for reversing the appointment made by the court of the first instance.

The appellants in their brief urge as an objection that the receiver heretofore appointed is a nonresident of the parish. The pleadings do not raise the objection. They are entirely silent regarding the residence of the receiver. We will not, therefore, pass upon an objection raised only in argument which should be of no force unless pleaded. We will state, however, that if the receiver resides at a great distance from the property of which he has control, it may prove detrimental to the interests of the company. In the present condition of affairs, however, and with the pleadings and evidence before us, we will not decide the question adversely to the appointment which has been made. Our brother of the district

court who has the matter in charge is invested with authority to require reports and accounts, and will not, we take it, permit an interest virtually under his control to suffer loss, because of the mismanagement arising out of the absence of the receiver he has appointed to administer the business of the corporation properly.

Intervenors and appellants have raised technical objections to the proceedings instituted for the appointment of a receiver, such as that the petition is not supported by a sufficient oath, as it does not appear that the attorney took the proper oath for his client in his absence; that the resolution of the board of directors, to which we have before referred, is not such as the law requires; and finally, that plaintiffs and appellees have no cause of action.

548 The intervenors and appellants having themselves admitted the necessity of an appointment of a receiver, and having made application for another appointment than that made, are not in a position to urge successfully that the proceedings for an appointment are null, because of defect or deficiency in the pleadings.

As relates to the appointment made, considered as an original question, we think, with the evidence before us, that the appointment of the agent selected by the court should remain undisturbed, as there is nothing to indicate that there will be the least improper management.

For the reasons assigned it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

Rehearing refused.

RECEIVER—STOCKHOLDER AS.—There is no legal obstacle or necessary impropriety in appointing a stockholder, a director, or even the president of the corporation, to the office of receiver, though in particular cases such an appointment would be obviously improvident: 5 Thompson on Corporations, sec. 6868. A judgment appointing a receiver for a corporation is not void merely because some of the stockholders are related to the judge making the appointment: *Ex parte Tinsley*, 87 Tex. Cr. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306.

STATE v. COLLINS.

[104 La. 629, 29 South. 180.]

CONSTITUTIONAL LAW—CRIMINAL TRIALS—ASSISTANCE OF COUNSEL.—Under a constitutional guaranty that a person accused of crime shall have the assistance of counsel, counsel appointed to defend the accused must be given a reasonable time to prepare his defense, to investigate the facts, and examine the law applicable to the case.

CRIMINAL LAW—TIME TO PREPARE FOR TRIAL—ASSISTANCE OF COUNSEL.—If an indictment for murder is returned, the accused assigned counsel, arraigned, and the case set for trial on one day, the day of trial being fixed for three days thereafter, it is error to refuse to grant a postponement applied for by the accused and his counsel on the ground that the latter, because of pressure of other law business, has no time in the interval to prepare the defense.

W. M. Wallace and E. E. Kidd, for the appellant.

W. Guion, attorney general, A. B. Hundley, district attorney, and L. Guion, for the appellee.

629 **BLANCHARD, J.** Defendant appeals from a death sentence.

The district court convened in regular session at Winnfield on July 16, 1900. The grand jury was impaneled and proceeded with the discharge of its duties. It returned into court an indictment for murder against the accused. He was brought into court from the parish jail, an attorney appointed to represent him (he being without counsel), was arraigned, pleaded not guilty and his case set for trial the following Thursday, July 19, 1900. All of this was done on the first day of the term.

On Wednesday, July 18th, on motion of E. E. Kidd, the attorney appointed to represent him, W. M. Wallace, attorney at law, was appointed as associate counsel in the case. The next day, Thursday, the day assigned for the trial, the court 630 seems to have been occupied with other business, and the case went over to Friday. On Friday it was called for trial, whereupon counsel appointed to the prisoner presented a motion for continuance, setting forth *inter alia* that the bill against him had been found and presented on Monday evening preceding, which was the first day of the term; that he had been unable to employ counsel for the reason that he had no means at his immediate command; that counsel had been appointed to him at once upon the presentation of the indictment; that he had

been unable, on account of the rapidity of the proceedings in his case, to make arrangements for counsel of his choice to defend him; that he had even been unable to fully explain his case to the counsel appointed to him so that they might prepare for his defense; that the reason he had been unable to confer with them was because they had been continuously engaged in other business before the court; that he had used all due diligence to communicate and confer with them without avail; and that the application was not made for delay, but that justice might be done. This was signed by the attorneys and sworn to by the accused.

The motion for continuance was overruled and the case ordered to trial, with the result that the accused was convicted. A bill of exceptions was reserved to this ruling, and it is urged here that the undue haste and precipitancy with which this trial was pushed through entitles the accused to a reversal of the verdict and sentence and another trial in the court a qua.

We gather from the brief of his counsel that following the murder, which the indictment avers was committed on June 4, 1900—the victim being a white man—the accused, a colored man, was arrested and incarcerated in the parish jail; that a few days subsequently an attempt was made to lynch him; that this was only prevented by the efforts of the district judge and sheriff; that following this attempt at lynching the judge, for the better security of the prisoner, directed the sheriff to carry him to the jail in Ouachita parish, which was done; and that he was kept confined there until Sunday night, July 15th, the day before the court convened in Winn parish, when he was brought back to the jail in the latter parish.

The point is made that while in jail in Ouachita parish he was far removed from relatives and friends and could not there make preparations for his defense. ⁶³¹ Also that the trial of the case was assigned by the prosecution for a date as early as possible under the law, which requires two days' service of copies of the venire and indictment. Indicted on Monday, set for trial on Thursday—Tuesday and Wednesday only intervening.

The further point is made that the senior counsel appointed to defend him was employed in all the cases that came before the court at that term, and hence his time was too much engrossed to prepare the instant case for trial in the short time intervening between indictment and trial, and while, as the judge a quo states in his reasons for overruling the motion for

continuance, he (the counsel) argued no cases up to Wednesday of the first week of court, the fact remains that he devoted his time and attention to the cases, did not argue those that were tried because not considered necessary, since the same were argued by his associate counsel, but was present and took part in the several trials.

With regard to the junior counsel appointed to the accused, it is urged that he became connected with the case only on Wednesday, the day before the case was set for trial—too late to be of any service in preparing the case for trial. Besides, it is stated that he too was employed in all the cases which came up for trial and were tried on Wednesday, the day of his appointment herein, and the next day, Thursday.

While the zeal displayed by our learned brother of the district court in the prompt vindication and enforcement of the law merits commendation, we are yet constrained to hold that, in this instance, he carried it a little too far. We differ from him in his ruling denying the continuance sought.

This was a capital case. The life of a human being was at stake and for the time being it was sheltered by the presumption of innocence. Great deliberation—an utter absence of precipitancy—should have characterized every movement of the court leading up to the conviction. "The law travels with a leaden heel, but strikes with an iron hand," is a maxim pregnant with obvious meaning. In this instance it doffed the "leaden heel," yet struck with the iron hand.

It is not unlikely that the previous attempt at lynching and the apprehension felt by the officers of the law of a second attempt being made in case of delay in bringing the accused to trial, may have influenced the situation to his detriment and caused the undue haste complained of.

⁶³² But this cannot be accorded the weight of justifying departure from the rule of calm deliberation. The right "to have the assistance of counsel" is one conferred by the constitution itself. Reasonable time to prepare for his defense should have been allowed the counsel, who had by direction of the court undertaken its responsibility. Only in this way could their "assistance" be made effective. Theirs was a task to be discharged without recompense. They had other duties to perform in connection with the court, growing out of employment in other cases bringing them professional fees. It was not to be expected they would lay these aside and devote themselves solely to preparation for the defense of the instant case which brought

them no reward. It does not seem to us that time enough was allowed for both.

In *State v. Simpson*, 38 La. Ann. 23, which was a murder trial, the indictment was returned into court on the 5th of October. The accused was arraigned and counsel assigned her the same day, and the case fixed for trial on the 9th of the same month. On that day the counsel asked a continuance, on the ground that he had been assigned as counsel only four days before, and had not had time to prepare to try the case because occupied with a mass of other business. He stated he believed there was a valid defense and that a reasonable time should be given to prepare it. He made affidavit himself to the averment of his motion. The continuance was refused. This court on appeal held it was error, and reversed the verdict and sentence. In doing so this language was used: "Considering that the offense charged was murder, that the indictment had only been filed at the same term of court, that the counsel assigned for the defense was a nonresident of the parish where the court was held, and had no sufficient opportunity to confer with the witnesses, and that the defense to be made required great research of authorities on a question of much difficulty and intricacy, we think the judge a quo erred in overruling the motion."

Further along in its opinion the court, speaking of the constitutional guaranty to persons charged with crime the right to be heard by counsel, said: "It would be a barren right if the counsel were not allowed a reasonable time to prepare for the defense, time to investigate the facts and to examine the law applicable to the case." ⁶³³ And concluding its opinion the court said: "A review of the entire record satisfies us that the prosecution was characterized by undue haste, scarcely compatible with the guaranty of a fair and impartial trial."

It is true in that case it was the counsel himself who swore to the inadequacy of the time which had been at his disposal to prepare for the defense. Here, the motion for continuance on the same ground was prepared and signed by the counsel appointed to the prisoner, but it was the latter who made the affidavit to the truth of its averments. The attorney should have made this affidavit and it was error not to have done so, but, under the circumstances of this case, we are constrained to hold that it is not sufficiently grave to warrant sustaining this verdict on that ground alone.

In *State v. Brooks*, 39 La. Ann. 241, 1 South. 421, the homicide was committed on September 29th. The accused was in-

dicted and arraigned on the 4th of October following, and his trial fixed for the 9th—five days later. Definite arrangements for counsel to defend him were not made until the day before the one assigned for the trial. Application for continuance was made on the ground of lack of time to prepare the defense. It was refused. This court held it was error, laying stress upon the fact that it appeared the accused was convicted on the ninth day following the commission of the offense for which he was indicted, and that the application for continuance was made on the first calling of the case for trial.

In *State v. Deschamps*, 41 La. Ann. 1051, 7 South. 133, this court reviewed the question at length and collated the authorities bearing thereon. Application for continuance was there made under oath by counsel assigned to the accused. He had been appointed only forty-eight hours previous to the calling of the case for trial. He had had no sufficient time to prepare the defense. He asked the indulgence of the court for time to prepare it. It was refused. On appeal here, held reversible error: See, also, *State v. Boyd*, 37 La. Ann. 781; *State v. Horn*, 34 La. Ann. 100.

These authorities establish the rule that counsel appointed to defend persons charged with crime should be allowed a reasonable time in which to prepare for trial, and this without being forced to a showing as to witnesses, and what is expected to be proven by them. Also that what is a reasonable time will not be left entirely to the discretion of the judge, but the same is reviewable here.

⁶³⁴ Under the circumstances of this case, the two or three days intervening between the assignment of counsel and the day of trial was not sufficient time in which to prepare to try a murder case. The case should have been allowed to go over at least to the second week of the term.

For the reasons assigned it is ordered, adjudged and decreed that the verdict and sentence be annulled, avoided, and reversed, and that the cause be remanded to the court a qua to be proceeded with according to law.

Rehearing refused.

TRIAL—COUNSEL.—A PRISONER cannot be tried for felony without counsel to assist him, unless he expressly waives that right: *Valle v. State*, 9 Tex. Ct. App. 57, 35 Am. Rep. 719. But see *McDonald v. Commonwealth*, 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

WYANT v. CENTRAL TELEPHONE COMPANY.

[123 Mich. 51, 81 N. W. 928.]

TELEPHONE COMPANIES—RIGHT TO CUT BRANCHES FROM TREES IN HIGHWAY.—If a telephone company is given the right to erect a line along a highway, it must, of necessity, have the right to remove obstructions. Hence, it may, in a proper manner, trim trees to obtain a free passage for its wires, without first giving the abutting owner an opportunity to do such cutting, but the company must answer for any unnecessary, improper, or excessive cutting.

EVIDENCE—JUDICIAL NOTICE—PLACE OF TELEPHONE POLES.—A court will take judicial notice that telephone poles in a highway must be set near the side thereof, generally outside of the curb or ditch line, and, therefore, necessarily in line with trees in the highway.

Howard, Roos & Howard, for the appellant.

Charles E. White, for the appellee.

52 HOOKER, J. The plaintiff commenced this action before a justice of the peace by summons, requiring defendant to answer a plea of trespass on the case. The declaration was trespass for breaking and entering plaintiff's close, and cutting and trimming trees growing in the close and in the highway adjacent thereto. The case was tried at circuit, on appeal, before the court, who filed written findings of fact and law. The record does not show whether or not a plea was filed. The finding shows that the defendant's servants, when constructing its telephone line along the highway, trimmed out some branches of trees (some standing within the highway, and some in plaintiff's close), so that the wires might not come in con-

tact with the branches, thereby becoming broken or grounded; that it was done in a reasonable manner, and that no more cutting or trimming was done than was necessary; and that to do this its servants took down the road fence, and with a team and heavily loaded wagon drove upon plaintiff's growing wheat "inside [probably meaning "outside"] the highway," and at the same time cut off certain limbs from all of said trees. The court found, as a conclusion of law, that while the defendant might place poles in the highway without proceedings for condemnation, it had no right to cut, injure, or mutilate trees, without compensation to the owner for any special damage occasioned thereby. A judgment for twenty-five dollars was rendered in favor of the plaintiff and the defendant has appealed.

It was admitted by plaintiff's counsel that the erection of a telephone line along the highway does not create an additional servitude upon abutting lands, and we need not cite authorities in support of that proposition. The right being given to erect the poles and wire, the company must of necessity have the right to remove obstructions, as the highway officers have authority to do when engaged in highway work within their jurisdiction. We may take judicial notice that poles must be set near the sides of the street or road, and that they are generally outside of the ⁵³ curb or ditch line, and therefore necessarily in line with the trees. Unless they are to be so high as to clear all of them, the wires must go through the trees. In cities and villages this may require the removal of large portions of the trees, if they are to go through them, and in such case it is possible that the company should use poles sufficiently high to avoid or minimize the injury to the trees; but that question is not before us under the findings. The plaintiff cites several authorities in support of his contention. *Detroit City Ry. v. Mills*, 85 Mich. 634, 48 N. W. 1007, is referred to, which, in the opinion of Mr. Justice Grant, says that: "It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it. . . . So far, then, as these defendants are concerned, it is immaterial whether they or the city own the fee in the street. Their rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property, having convenient ingress and egress, and the use of the street is an authorized and proper public use, they have no legal cause for complaint."

This opinion is concurred in by Mr. Justice Long, while Mr. Justice Champlin said that: "If, in any case, it is such an invasion of private rights as to cause damage to the owner of the fee of the soil or abutting proprietors, I think they have a legal remedy to recover such damage in a suit at law. And so with regard to the setting of poles to aid the propulsion of cars by electricity. I do not think, ordinarily, it is such a taking of private property as requires condemnation and compensation before the poles can be set, but I think if the owner suffers damage on account of the erection of poles, he should seek his remedy at law for such damage."

Dean v. Ann Arbor St. Ry., 93 Mich. 330, 53 N. W. 396, is cited as implying that if one of the abutting owners has suffered any special damages, he may have an action at law; but this case does no more than to decide that ⁵⁴ the remedy for special injury to property is at law. It affirms the holding of *Detroit City Ry. v. Mills*, 85 Mich. 634, 48 N. W. 1007, that a new servitude is not created by a street railroad, but does not undertake to decide that a right of action existed.

The case of *Hobart v. Milwaukee etc. R. R. Co.*, 27 Wis. 194, 9 Am. Rep. 461, held that: "The construction and operation of a horse railway in the public streets of a city, by authority from the city government, is not a new burden imposed upon the owners of the fee of the land, and they are not entitled to a compensation therefor, except where some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby."

It also held that: "The owner of a store has no such right to use the street in front thereof, by having drays and wagons, with teams attached, stand transversely upon the street while discharging goods, as will entitle him to recover against a horse railway company which has so constructed its track (under authority from the city) as to interfere with such use of the street, but he may be compelled, if public convenience requires it, to discharge the goods from wagons or drays standing lengthwise of the street."

The case is not in point. It vindicates the land owner's right of access to the street, and at the same time sustains the paramount right of the public to a proper use of the highway. It is in harmony with *Detroit City Ry. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

The case of *Tissot v. Great Southern Teleph. etc. Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 South. 261, is not at variance

with the other authorities, as it only sustains a right of action for invading plaintiff's premises, and so cutting branches overhanging the street as to leave an open space from twenty-five to forty feet in circumference for the purpose of the passing of an almost imperceptible wire, and when the posts and wires could have been, with less or no inconvenience, located elsewhere. *Memphis Bell Teleph. Co. v. Hunt*, 84 Tenn. 456, 57 Am. Rep. 237, 1 S. W. 159, only holds that there is no right to enter private premises for the purpose of cutting branches. This ^{is} elementary. The case of *Magee v. Overshiner*, said to be reported in 64 Am. P. R. 358, is cited upon the question, but we have been unable to find the case. (The case erroneously cited is an Indiana case (150 Ind. 127, 49 N. E. 951), reported in 65 Am. St. Rep. 358.)

None of these cases, unless it be the last mentioned, sustains plaintiff's principal contention, and we think it is not the law in this state. It might well be the law in a state where a telephone is an additional servitude in the absence of condemnatory proceedings.

It is said that the telephone company had no right to cut these branches, without first giving the land owner an opportunity to do so himself. This claim is based on the case of *Clark v. Dasso*, 34 Mich. 86, in which it was held that a highway commissioner could not sell trees upon the highway, and intimating that, before he could remove trees that were a public obstruction, he must give the owner the opportunity. The case rested on a statute (1 Comp. Laws 1871, sec. 1317) which authorized the cutting and removal of trees and shrubs obstructing or injuring a highway, by order of the highway commissioners. Plainly, this case does not come within the statute, because the statute refers only to the cutting down or removal of trees and shrubs, not the trimming of trees; and again, it is not a statute that purports to impose a duty upon commissioners, but was intended to exempt them from the penalty prescribed by statute, recognizing the possible necessity of removing trees in highways. Moreover, we do not discover that this statute is still in force, except in a modified form: 2 Comp. Laws 1897, sec. 4159. If the telephone company has the right to have the branches cut, to admit stringing and operating its wires, the legislature has committed to no one, unless it be the company, the authority to do this. No one could do this satisfactorily until the wires should be strung, and until the legislature provides otherwise, we must think that the companies may

do it, being answerable for any unnecessary, improper, or excessive cutting. We are convinced ⁵⁸ that it is the right of the company to cut branches in a proper case and manner, and in such case there is no liability to the abutting proprietor, who has no right to obstruct the public use of the highway.

The case is reversed, and as the findings show that a trespass upon the close may have been committed, a new trial is ordered.

The other justices concurred.

TELEPHONE COMPANIES—RIGHT TO TRIM TREES.—Under a license from a municipal corporation for the erection of a telephone line or a fire-alarm telegraph, there is no authority to enter private property and cut off the limbs of trees, although they project over the line of the sidewalk on the street: See the monographic note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 235, treating of telegraph and telephone poles and wires in streets and highways and across private property.

HOEFT v. KOCK.

[123 Mich. 171, 81 N. W. 1070.]

CORPORATIONS—INCREASE OF CAPITAL STOCK—WHEN BINDING THOUGH NOT RECORDED.—If all the stockholders of a corporation, after notice, meet and adopt a resolution to increase the capital stock, and money is handed to the manager to cover the cost of recording certificates in the offices of the county clerk and secretary of state, there is an increase of stock de facto, and one who buys stock after such increase cannot recover its value from the officers of the corporation, on the ground that the failure to record the resolution rendered the attempt to increase the capital stock inoperative.

Case against the defendants Kock and Uelsmann, impleaded, etc., for alleged misrepresentations in the sale of corporate stock. The court directed a verdict for the defendants and from the judgment thereon the plaintiff brought error.

Walter Barlow, for the appellant.

Thomas Hislop, for the appellees.

¹⁷¹ **MONTGOMERY, C. J.** On a former appeal the judgment for plaintiff was reversed (*Hoeft v. Kock*, 119 Mich. 458, 78 N. W. 556), and the case remanded for a new trial. A second trial has been had, and at the conclusion of the trial a ver-

dict was directed for the defendants. The declaration avers, among other things, that the defendants fraudulently represented that the authorized capital stock was fifty thousand dollars; the theory of the declaration apparently being that, more than twenty-five thousand dollars having been issued before that in question was issued to plaintiff, the issue to him was invalid, and that he is entitled to recover the amount paid, as for a fraud committed ¹⁷² against him by defendants. The undisputed testimony shows that prior to the issue of the stock in question, upon a notice to all stockholders, and at a meeting at which all were present, a resolution increasing the authorized capital stock to fifty thousand dollars was passed in due form, and money handed to the manager to cover the cost of recording certificates in the offices of the county clerk and secretary of state. It is evident that all parties understood that this amendment had been filed. The plaintiff himself became a director and acted for some time. Two years and more after the purchase of the stock, after the company was in financial straits, he discovered the omission, and tendered back his certificate of stock, and now seeks to recover its value from the defendants on the ground that by issuing the certificate (the one as president, and the other as secretary) they represented that they had lawful authority to issue it, when in fact they had not.

It is said that the failure to record the resolution increasing the capital stock rendered the attempt to increase inoperative. It is undoubtedly true that the state might proceed against the corporation, but it does not follow that stockholders are in a position to complain. The stockholders, who all participated in the increase, cannot be heard to say that it was unauthorized. There was an increase of the stock de facto. The plaintiff was in no way damaged because of the omission to file and record the resolution: 1 Cook on Stock and Stockholders, sec. 288; Chubb v. Upton, 95 U. S. 665.

The judgment is affirmed.

The other justices concurred.

CORPORATIONS — INCREASE OF STOCK.— A corporation organized under a statute can increase its capital stock only in the mode prescribed by such statute: McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 208, 45 N. E. 954.

CLELAND v. CLARK.

[123 Mich. 179, 81 N. W. 1086.]

APPEAL—WHAT QUESTION CANNOT BE FIRST RAISED ON.—An objection that a bill in aid of execution was not filed in time cannot be raised for the first time on appeal.

REAL PROPERTY.—AN ALLOWANCE FOR BETTERMENTS SHOULD BE BASED on the increased value of the premises, and not on the cost of the improvements.

REAL PROPERTY—ALLOWANCE FOR BETTERMENTS—WHEN PROPER.—An occupant's honest belief in his right or title to land is "good faith" within the meaning of the betterment law. Hence, a purchaser of land who believes that he is getting a good title, who enters thereon under a quitclaim deed, and who improves the land without notice of a judgment against his vendor, has color of title in good faith, and a lien upon the land for his improvements, which is paramount to that of the judgment creditor, who has levied execution.

EQUITY—DECREE FOR BETTERMENTS—WHEN PROPER.—If a complainant files a bill in aid of execution to reach land in the possession of one who bought and improved it without knowledge of the complainant's judgment, the decree should make an allowance for betterments in favor of the occupant.

Bill by Cleland against John H. Clark, Mary Clark, Charles Carpenter, Harriet Carpenter, George Newville, Lena Newville, and Isaac Manchester in aid of execution.

Rolland J. Cleland and Arthur Lowell, for the complainant.

Dan. T. Chamberlain, for the defendants Carpenter.

Charles B. Cross, for the defendants Newville.

¹⁸⁰ **MOORE, J.** This proceeding was commenced by a bill filed in aid of an execution. The complainant obtained a judgment against John H. Clark, and caused a levy to be made upon land in which he claimed Clark had an interest. He also claimed that Clark had fraudulently conveyed away some of the land, and he asked to have the conveyances set aside, and that he might be allowed to sell the land free from said conveyances. The circuit judge made a decree to the effect that forty acres of said land, when the levy was made, was occupied by Clark as a homestead, and was exempt from levy and sale upon execution, and that said land is now owned by the defendants Newville, and that the levy upon said land was a cloud upon the title, and required complainant to make a release of the levy. The decree also finds that Harriet Carpenter has a mortgage interest in the west eighty acres of the land in controversy,

amounting to seven hundred and twenty-eight dollars, for which amount she is given a lien upon said land. It also finds that Mrs. Carpenter entered into possession of the land ¹⁸¹ under color of title, and occupied it in good faith, and made improvements thereon amounting to seven hundred dollars, for which she is given a further lien upon said lands. It further finds that there is due the complainant five hundred and twenty-three dollars, for which, by reason of his levy, he has a lien upon all of the land, except the forty acres decreed to be a homestead, subject to the lien of Mrs. Carpenter of fourteen hundred and twenty-eight dollars, and authorized the complainant to sell said land, subject to said lien, to satisfy his debt. From this decree complainant appeals. None of the defendants appealed.

The solicitors for the defendants urge here for the first time that under the provisions of 2 Howell's Statutes, section 6108 (3 Comp. Laws 1897, sec. 9167), complainant did not bring his proceeding in time (citing *Edsell v. Nevins*, 80 Mich. 151, 44 N. W. 1115), and that the bill should have been dismissed. The defendants have not appealed from the decree. No such claim was made in any of the answers, nor was it made in the court below. Issue was joined and a full hearing had upon the merits. The question cannot, under such circumstances, be raised here for the first time.

It is the claim of the complainant that all of the land described in the bill of complaint should be subject to his levy, and he makes a long argument in support of his position. We are satisfied with the decree below in relation to the homestead of Mr. Neville, and with that part of the decree finding Mrs. Carpenter entitled to a mortgage lien upon the land, and do not deem it necessary to discuss those features of the case. The portion of the decree in relation to which we think discussion is necessary is that part of it giving Mrs. Carpenter a lien for the value of her improvements ahead of the lien established by the attachment and execution levy. It is the claim of the complainant that this part of the decree cannot be sustained, for three reasons: 1. Because Mrs. Carpenter is not an occupant under color of title and in good faith; ¹⁸² 2. Because her title is by quitclaim deed (citing *Peters v. Cartier*, 80 Mich. 124, 29 Am. St. Rep. 508, 45 N. W. 73); 3. Because, by virtue of the statute (3 Comp. Laws 1897, sec. 10,995), the measure of the sum to be paid for the improvements is not the cost of the improvements, but the increased value of the premises.

There is no doubt the rule is properly stated in the third reason as to the value of the improvements. The objection was not made in the court below to the testimony of the witnesses who testified as to the cost of the improvements, that they should not be allowed to testify as to the cost of the improvements, but should confine their testimony to stating how much the improvements enhanced the value of the land. So far as the record discloses, this objection is made here for the first time. The witnesses were sworn in open court. The record is in the narrative form. The witnesses testified as to the value of the improvements. They were not required to limit their testimony to the enhanced value of the land by reason of the improvements. We are not prepared to say the circuit judge reached a wrong conclusion as to the value of these improvements.

As to the first of these reasons: The purchase of the land was made by Mr. Carpenter on the part of his wife. He testifies that when he bought the land for his wife he bought it in good faith, and supposed he was buying a good title, and that they knew nothing to the contrary until nearly all the improvements had been made. It is the claim of complainant that in May, after the Carpenters moved upon the land, he saw Mrs. Carpenter at her home, and notified her that she must not make improvements upon the land. Cleland at the same time gave a like notice to Mr. Newville, who was living on the forty acres obtained by him from Mr. Clark. Mr. Newville testified that the value of the improvements made by the Carpenters on their land at this time was from seven to eight hundred dollars. The circuit judge had the advantage ¹⁸³ of seeing the witnesses and judging of their credibility. The testimony justified the circuit judge in the conclusion he reached as to the value of the improvements made before complainant notified the defendants they must not make their improvements.

Is the case of *Peters v. Cartier*, 80 Mich. 124, 20 Am. St. Rep. 508, 45 N. W. 73, conclusive against the right of Mrs. Carpenter to make this defense? The opinion in that case indicates pretty clearly that Cartier knew he had no title. It is stated there, as is claimed by counsel here, that persons who hold by a quitclaim deed are not bona fide purchasers; but as was explained in *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143, and *Culbertson v. Witbeck Co.*, 92 Mich. 469, 52 N. W. 993, the case arose under the recording laws, and does not apply to the case at bar: See, also, *Otis v. Kennedy*, 107 Mich. 312, 65

N. W. 219. If the complainant had faith enough in his attachment and execution levy to buy in the land at execution sale, and had then brought ejectment, could there be any doubt of the right of Mrs. Carpenter under the provisions of section 10,995 of 3 Compiled Laws of 1897 to make this defense? Why should she be deprived of that right because the complainant has seen fit to appeal to the equity side of the court? The theory of all the betterment laws is that no one should be made richer at the expense of another. The claim for betterments is founded upon equitable grounds, and it would be a novel proposition that one could cut off an equitable defense, which could be successfully urged at law, by selecting the equity court as a forum, instead of litigating his case upon the law side of the court. As was said by Justice Montgomery in *Petit v. Flint etc. R. R. Co.*, 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. 554: "The good faith intended by this statute means honest belief of the occupant in his right or title": See, also, *Miller v. Clark*, 56 Mich. 337, 23 N. W. 35; *Sherman v. A. P. Cook Co.*, 98 Mich. 61, 57 N. W. 23; *Lemerand v. Flint etc. R. R. Co.*, 117 Mich. 309, 75 N. W. 763; *Cole v. Johnson*, 53 Miss. 94; *Rawson v. Fox*, 65 ¹⁸⁴ Ill. 200; *Griswold v. Bragg*, 19 Blatchf. 94, 6 Fed. 342; *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. Rep. 303.

The decree of the court below is affirmed. We are asked to allow defendants Newville more than usual costs. We decline to do so. The defendants will have costs of this court.

The other justices concurred.

Betterments, What are and When Allowance Should be Made Therefor.*

A *Betterment* is an improvement to realty which is more extensive than ordinary repair, and increases in a substantial degree the value of the property; melloration: *Anderson's Law Dictionary*. Thus, the value of real property may be enhanced by additions to it: *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623; by the erection of a house thereon: *Schmidt v. Armstrong*, 72 Pa. St. 355; *Schenley's Appeal*, 70 Pa. St. 93; by putting in an additional wood floor in a building: *Harris v. Kelly* (Pa., April, 1888), 13 Atl. 523; by replacing old buildings with new and better ones: *Stevens v. Melcher*,

***REFERENCES TO MONOGRAPHIC NOTES.**

Compensation for improvements in ejectment: 15 Am. Dec. 349-354.
 Of the liability of one cotenant to another for rents and profits received from and for expenditures made upon their common property: 52 Am. St. Rep. 924-941.
 Right of person to recover damages for the failure of the other party to perform a contract not valid under the statute of frauds, as where improvements are put on land, or other acts done relying upon subcontracts: 6 Am. St. Rep. 491-497.

152 N. Y. 551, 46 N. E. 965; by the erection of fences: *Croskery v. Busch*, 116 Mich. 288, 74 N. W. 464; *Morton v. Lewis*, 16 U. C. O. P. 486; by the digging of ditches: *Beard v. Morancy*, 2 La. Ann. 847; by the digging of a well: *Morton v. Lewis*, 16 U. C. O. P. 485; by the building of levees: *Beard v. Morancy*, 2 La. Ann. 847; or by the clearing of unimproved lands: *Croskery v. Busch*, 116 Mich. 288, 74 N. W. 464; *Beard v. Morancy*, 2 La. Ann. 847; and these are matters proper to be considered by a jury in determining whether improvements have been made. If such things enhance the value of the property, they are betterments or improvements. A sidewalk alongside of property is a lasting improvement, if necessary thereto: *Hentig v. Redden*, 88 Kan. 496, 16 Pac. 820; but see *Stark v. Starr*, 1 Saw. 15, Fed. Cas. No. 13,307, cited *infra*. And one who plants an apple orchard is entitled to credit therefor as a permanent improvement where it has enhanced the value of the land: *Donehoo v. Johnson*, 113 Ala. 126, 21 South. 70. The same is true of a stand of clover and orchard grass: *Thompson v. Buckner*, 19 Ky. Law Rep. 431, 40 S. W. 915; but see *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611. In short, the word "improvement" may be said to comprehend everything that enhances the value of a building or place of business, whether it is a store, manufacturing establishment, warehouse, or farming premises: *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623. But ordinary repairs, to meet the usual wear and tear of premises, cannot be classed as permanent improvements: *McKenzie v. Bacon*, 41 La. Ann. 6, 5 South. 640; and are excluded from consideration in this note, although it is said in *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611, that repairs to buildings are usually treated as permanent improvements. If repairs enhance the value of premises, it would doubtless be proper to treat them as lasting and permanent improvements; otherwise not. Commercial fertilizers cannot be regarded as permanent improvements: *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742; nor the ordinary cultivation of land: *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611; nor is a street improvement an improvement on the property: *Stark v. Starr*, 1 Saw. 15, Fed. Cas. No. 13,307; but see *Hentig v. Redden*, 88 Kan. 496, 16 Pac. 820, cited *supra*. A wall out of the true course is not an improvement to property, but an injury to it: *Leavison v. Harris*, 12 Ky. Law Rep. 488, 14 S. W. 343; and the disclosing of granite on premises, though by means of the occupant's operations, is not an improvement for which he is entitled to credit: *Peabody v. Hewett*, 52 Me. 83, 83 Am. Dec. 486. The phrase "permanent improvements" means something done to or put upon the land which the occupant cannot remove or carry away with him, either because it has become physically impossible to separate it from the land, or because, in contemplation of law, it has been annexed to the soil and is therefore to be considered a part of the freehold. But whatever

the occupant may remove, when ejected from the premises, is not a permanent improvement, and no allowance can be made therefor: *Stark v. Starr*, 1 Saw. 15, 28, Fed. Cas. No. 13,307. One who claims credit for alleged improvements must show that they have benefited or enhanced the value of the property: *Bacon v. Thornton*, 18 Utah, 188, 51 Pac. 153.

The more important question, however, to be considered in this note is to show when credit should be given for betterments or improvements, without considering contracts concerning them, made between the claimants and persons against whom payment is sought to be enforced. Improvements of a permanent character made upon land and attached thereto without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee without reimbursement from him: *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 84 N. E. 476. If a stranger, or one not having a colorable title, places improvements upon the land of another, either by mistake or with a knowledge that the land belongs to the latter, they become the latter's property, and the maker of such improvements is not entitled to credit for them as betterments: *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353; *Mitchell v. Bridgman*, 71 Minn. 360, 74 N. W. 142; *Barlow v. Bell*, 1 A. K. Marsh. 246, 10 Am. Dec. 731; *Anderson v. Williams*, 59 Ark. 144, 26 S. W. 818; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564. If a building is erected on land against the will of the land owner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste: *Jones v. Shufflin*, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975. A house built by mistake on the land of another becomes a fixture thereon, and follows the tenure of the soil whereon it stands: *Dutton v. Ensley*, 21 Ind. App. 46, 69 Am. St. Rep. 340, 51 N. E. 380. One is not ordinarily entitled to compensation for permanent improvements placed by him on another's land if, when making them, he had notice, actual or constructive, of the superior right of another; neither is he entitled at law to such compensation, where he has notice of facts rendering his title defective, but, by mistake of law, regards it as good: *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411.

By the rigid rules of the common law, whoever put improvements upon real estate did so at his peril. No matter though he acted in good faith and in the honest conviction that the land was his, whenever any other party judicially established his title to the land, such party had a right to all the improvements situated upon it: *Note to Pitt v. Moore*, 6 Am. St. Rep. 495. This rule was founded upon the notion that the owner should not pay an intruder, or disseisor, or occupant for improvements which he never authorized. It was supposed to be founded in good policy, inas-

much as it induced diligence in the examination of titles, and prevented intrusions upon and appropriations of the property of others: *Parsons v. Moses*, 16 Iowa, 440, 444. But the rule of the civil law was more liberal, and permitted one who had made permanent improvements on land in his possession, under the bona fide belief that he was the owner of it, to exact full compensation for the value of such improvements, less the value of the use of the land, before he could be compelled to surrender it: *Putnam v. Ritchie*, 6 Paige, 390, 404. Chancery borrowed this rule of natural equity from the civil law, and made the first innovation upon the common-law doctrine. Where the true owner came into a court of equity, as a complainant, seeking an account against the purchaser for mesne profits, after a recovery of the land in an action at law, or when such owner had only an equitable title, and was compelled to sue in equity for a recovery of the land, the court refused its aid to the complainant, except upon the terms of compensation to the bona fide holder for his improvements: *Note to Pitt v. Moore*, 6 Am. St. Rep. 495. This was based upon the familiar maxim that he who seeks equity must do equity. The rule thus adopted in equity was subsequently imported into the common-law courts in the equitable action of trespass on the case for mesne profits, so far as to limit the recovery in such action to the excess of profits after deducting the value of the permanent improvements made on the land by the defendant in good faith, and in the honest belief that the land was his. The equity of the bona fide possessor who had made lasting and permanent improvements upon lands which turned out to be another's was so strong and persuasive as to force its recognition to this partial extent by courts of law without the aid of a statute: *Note to Pitt v. Moore*, 6 Am. St. Rep. 495. The great struggle was to find a way to relieve the bona fide occupant who lost his improvements from also paying full rent for the land. Aside from the statute, it was only done to the extent of allowing him, when sued for the rents and profits, to set off against them the value of the permanent improvements. If the improvements exceeded the claim of the owner for profits, no compensation for the excess could be allowed: *Parsons v. Moses*, 16 Iowa, 440, 446; monographic note to *Jackson v. Loomis*, 15 Am. Dec. 350, on compensation for improvements in ejectment. The whole doctrine of compensation for improvements, except as fixed by statute, is an outgrowth of equity, and rests on equitable principles: *Barton v. National Land Co.*, 27 Kan. 634, 637. But laws, known as "betterment acts," have been passed in many of the states, enlarging the rights of bona fide possessors. The particulars in which the rights of an occupying claimant have been enlarged by such acts, at least in some of the states, are, that he can recover for improvements in a direct, affirmative proceeding against the owner, and that he is not limited in the amount of

his recovery to the value of the rents and profits: *Parsons v. Moses*, 16 Iowa, 440, 446. With respect to the rights of a bona fide possessor of real property, which has turned out to be another's, to be credited with improvements placed thereon by himself, the "betterment acts" have become the predominant statutory system of the country: *Griswold v. Bragg*, 18 Blatchf. 202, 206, 48 Fed. 519; 48 Conn. 577, 581; and there is, therefore, a general recognition of his right to be compensated therefor. In other words, one who places lasting and permanent improvements upon land, under color of title or in the bona fide belief that the land is his own, is entitled, as a general rule, either in equity or under the betterment acts, to an allowance for such improvements, where they have enhanced the value of the premises and it subsequently turns out that the land belongs to some other person, who seeks to obtain possession thereof: *Whitledge v. Walt*, *Sneed*, 335, 2 Am. Dec. 721; *Thomas v. Thomas*, 16 B. Mon. 424; *Bond v. Hill*, 37 Tex. 626; *Wood v. Cahill*, 21 Tex. Civ. App. 38, 50 S. W. 1071; *Kibbe v. Campbell*, 34 La. Ann. 1163; *Succession of White*, 51 La. Ann. 1702, 26 South. 428; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411; *Barlow v. Bell*, 1 A. K. Marsh. 246, 10 Am. Dec. 731; *Howard v. Massengale*, 13 Lea, 577; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. 153; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; note to *Pitt v. Moore*, 6 Am. St. Rep. 496; *Rhea v. Allison*, 3 Head, 176; *Humphreys v. Holtsinger*, 3 Sneed, 228; *Mathews v. Davis*, 6 Humph. 324; note to *Jackson v. Loomis*, 15 Am. Dec. 353.

Betterment Acts, in some of the states, have given one who has color of title, or who, in good faith, enters upon and places lasting and permanent improvements upon another's land, believing it to be his own, the right to recover for such improvements in a direct, affirmative proceeding against the owner: *Parsons v. Moses*, 16 Iowa, 440, 446; *Barker v. Owen*, 93 N. C. 198; *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 180; *Asia v. Hiser*, 22 Fla. 378; *Whitney v. Richardson*, 31 Vt. 300; *Brown v. Baldwin*, 121 Mo. 106, 25 S. W. 858; *Henderson v. Langley*, 76 Mo. 226; *Cox v. McDivitt*, 125 Mo. 358, 28 S. W. 597; *McKinly v. Holliday*, 10 Yerg. 477; *Pacquette v. Pickness*, 19 Wis. 219; *Wernke v. Hazen*, 32 Ind. 431; *Hollingsworth v. Stumph*, 131 Ind. 546, 30 N. E. 525; *Fish v. Blasser*, 146 Ind. 186, 45 N. E. 63; *Tumbleston v. Rumph*, 43 S. C. 275, 21 S. E. 84; *Salinas v. Aultman*, 45 S. C. 283, 22 S. E. 839; and see the extended note to *Pitt v. Moore*, 6 Am. St. Rep. 496. Until Judge Story's decision in *Bright v. Boyd*, 1 Story, 478, 495, Fed. Cas. No. 1875, it was considered that courts of equity had no power to grant affirmative relief at the suit of a bona fide possessor against the true owner, but in that case it was decided that they do have such power. The case mentioned, however, seems not to be the established law of the country, apart from the statute, though its doctrine has been approved in a number of decisions: Notes to *Pitt v. Moore*, 6 Am. St.

Rep. 496; Jackson v. Loomis, 15 Am. Dec. 353; Anderson v. Reid, 14 App. D. C. 54, 79, 80, commenting upon Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1875, at considerable length; Fricke v. Safe Deposit etc. Co., 183 Pa. St. 271, 38 Atl. 601; Killmer v. Wuchner, 79 Iowa, 722, 18 Am. St. Rep. 392, 45 N. W. 299. In Williams v. Vanderbilt, 145 Ill. 238, 36 Am. St. Rep. 486, 34 N. E. 470, it is held that, in equity, when one has made improvements innocently, or through mistake, upon the land of another, he will not ordinarily be allowed to enforce a claim for reimbursement as an actor; that when the true owner seeks relief in equity he may be required to make compensation for the improvements; that compensation in such a case will be allowed only for the increased value caused by the improvements; that courts of equity will not grant active relief and sustain a bill to recover for such enhanced value after the true owner has recovered the premises at law; and that to entitle one making improvements on the land of another innocently, or through mistake, to recover the value thereof in proceedings instituted by the true owner, he must show that he made the improvements under a claim of title which proved defective, or under some mistake concerning his rights, or because he was induced to incur the expenditure through the fraud or deception of the owner. It is well established that statutes allowing compensation to occupants of land, under color of title and belief of ownership, for permanent and beneficial improvements made thereon by them in good faith, are constitutional: Fee v. Cowdry, 45 Ark. 410, 55 Am. Rep. 560; Beard v. Dansby, 48 Ark. 183, 2 S. W. 701; Griswold v. Bragg, 18 Blatchf. 202, 48 Conn. 577, 43 Fed. 519; Ross v. Irving, 14 Ill. 170; Armstrong v. Jackson, 1 Blackf. 374; Childs v. Shower, 18 Iowa, 261; Fisher v. Cockerill, 5 T. B. Mon. 129; Cahill v. Benson, 19 Tex. Civ. App. 30, 46 S. W. 888; Stump v. Hornback, 94 Mo. 26, 6 S. W. 356; Barker v. Owen, 93 N. C. 198; McCoy v. Grandy, 3 Ohio St. 463; Scott v. Mather, 14 Tex. 235; Pacquette v. Pickness, 19 Wis. 219.

One who seeks, under the betterment laws, to recover compensation for improvements by a direct proceeding against the owner of the property must bring himself within the statute and pursue the statutory remedy: Huebschmann v. McHenry, 29 Wis. 655; Province v. Lovi, 4 Okla. 672, 47 Pac. 476; see, also, Hall v. Boatwright, 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001. These betterment laws are founded upon equitable grounds, and proceed upon the theory that no one should be made richer at the expense of another: See the principal case; Lemerand v. Flint etc. R. R. Co., 117 Mich. 309, 75 N. W. 763; Wood v. Conrad, 2 S. Dak. 334, 50 N. W. 95; Hall v. Boatwright, 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; and a claim under them for permanent improvements or betterments can be successfully asserted only by one who is a

bona fide occupant or possessor, for it would be manifestly inequitable to the owner, and, indeed, a highly dangerous policy, to make allowances for improvements to one who made the expenditures with a full knowledge of superior rights: *Linthicum v. Thomas*, 59 Md. 574, 583; *Lemerand v. Flint etc. R. R. Co.*, 117 Mich. 309, 75 N. W. 763; *Shaw v. Hill*, 46 Ark. 333; *Teaver v. Akin*, 47 Ark. 528, 1 S. W. 772; *Wood v. Conrad*, 2 S. Dak. 334, 50 N. W. 95. To obtain compensation for improvements, the possession or occupancy of the claimant must be in "good faith," under color or claim of title, in some of the states, or, in others, under the supposition or belief that his title is good: *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118; *Walker v. Arnold*, 71 Vt. 263, 44 Atl. 351; *Wood v. Conrad*, 2 S. Dak. 334, 50 N. W. 95; *Teaver v. Akin*, 47 Ark. 528, 1 S. W. 772; *Dawson v. Grow*, 20 W. Va. 333, 1 S. E. 564; *Carter v. Brown*, 35 Neb. 670, 53 N. W. 580; *Seymour v. Cleveland*, 9 S. Dak. 94, 68 N. W. 171; *Cain v. Cox*, 29 W. Va. 258, 1 S. E. 298; *Salinas v. Aultman*, 45 S. C. 283, 22 S. E. 889; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260. Good faith occupancy, accompanied by color of title, entitling the defendant in ejectment to recover compensation for improvements in case of plaintiff's recovery, means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy: *Petit v. Flint etc. R. R. Co.*, 119 Mich. 492, 75 Am. St. Rep. 417, 73 N. W. 554. Under a statute allowing compensation for improvements, made by defendants in ejectment, who shall have "occupied" the premises for a less time than six years, under color of title and in good faith, a defendant in ejectment who, before the commencement of the action, entered upon the premises in good faith, under color of title, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house, is entitled to recover for such improvements, and it is error to exclude such evidence of occupancy, for the occupancy required by such a statute does not imply that the claimant shall have actually lived and made his home upon the disputed property: *Jones v. Merrill*, 113 Mich. 433, 67 Am. St. Rep. 475, 71 N. W. 838. If the circumstances, in an action of ejectment, throw doubt upon the defendant's good faith in occupying the property, this is a question for the jury: *Jones v. Merrill*, 113 Mich. 433, 67 Am. St. Rep. 475, 71 N. W. 838. In South Dakota "good faith" has a statutory definition: *Wood v. Conrad*, 2 S. Dak. 334, 50 N. W. 95. Compensation for improvements on eviction is allowed, where they have been made in good faith, because, though in law they belong to the owner of the estate, in equity and good conscience they belong to him who made them: *Pugh v. Bell*, 2 T. B. Mon. 125, 15 Am. Dec. 142.

Bona fide occupancy or possession, under color or claim of title, gives the occupant a right upon eviction to credit for his permanent

and valuable improvements placed by him in good faith upon the land: *Lamar v. Minter*, 13 Ala. 31; *Boatner v. Ventress*, 8 Mart., N. S., 644, 20 Am. Dec. 266; *Dorn v. Dunham*, 24 Tex. 366; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701; *Jackson v. Loomis*, 4 Cow. 168, 15 Am. Dec. 347; *Whitledge v. Walt, Sneed*, 335, 2 Am. Dec. 721.

A bona fide possessor of land is one who not only supposes himself to be the true proprietor of it, but who is ignorant that his title is contested by some other person claiming a better right to it; and after such occupant has notice of such claim, he becomes a mala fide possessor: *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. Rep. 303. To constitute a possessor in good faith, he must not only believe that he is the true owner, and have reasonable ground for that belief, but he must be ignorant that his title is contested by any person claiming a better right, yet he might still be a possessor in good faith, though aware of the claim, if he has reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation: *Parrish v. Jackson*, 69 Tex. 614, 7 S. W. 436; *Dorn v. Dunham*, 24 Tex. 366, 380; *Houston v. Sneed*, 15 Tex. 307; *Sartain v. Hamilton*, 12 Tex. 219, 62 Am. Dec. 524. One entering into possession of land under a deed which is afterward adjudged to be void and set aside for want of delivery by the grantor may nevertheless be regarded as holding adversely by color of title founded on a written instrument: *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886. And a defendant in ejectment is entitled to an allowance for his improvements, as a possessor in good faith, though he knew of the plaintiff's title, where it turned to be a forgery: *Galther v. Harlick*, 69 Tex. 92, 6 S. W. 619. But a holding under an invalid certificate of homestead entry is not such an adverse holding by color of title as will entitle the holder upon eviction to credit for his improvements: *Whitcomb v. Provost*, 102 Wis. 278, 78 N. W. 432. An occupant does not have color of title, and there is consequently nothing on which to base a claim for improvements where he has merely a bond for a title: *White v. Stokes*, 67 Ark. 184, 53 S. W. 1060; *Seymour v. Cleveland*, 9 S. Dak. 94, 68 N. W. 171. A defendant who enters upon land and erects buildings thereon after the commencement of an action to oust him is not an occupant in good faith: *Richwine v. Presbyterian Church*, 135 Ind. 80, 34 N. E. 737; nor can an evicted vendee, under a defective title, the nullity of which is apparent from an inspection of the title itself, be considered a possessor in good faith: *Dohan v. Murdock*, 41 La. Ann. 404, 6 South. 131. So a purchaser who knows all the facts about an outstanding valid title, but who in good faith mistakes the law in reference thereto, is not a bona fide purchaser entitled to an allowance for his improvements: *Holmes v. McGee*, 64 Miss. 129, 8 South. 169; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701. One who has taken a contract in writing for lands, but who has paid nothing

thereon, and has not taken a deed therefor, is not a bona fide purchaser, entitled to credit for improvements made by him on the property: *Schetter v. Southern Oregon Co.*, 19 Or. 192, 24 Pac. 25. So one who takes possession of land under a contract of purchase, and a bond for a deed executed by the vendor, does not hold under color of title or adversely to the vendor, in good faith, so as to be entitled to compensation for his improvements: *Seymour v. Cleveland*, 9 S. Dak. 94, 68 N. W. 171; and one who makes improvements upon land after being informed by his attorney that he is not the owner, is not entitled to credit therefor, as they were not made in good faith: *White v. Stokes*, 67 Ark. 184, 53 S. W. 1060. No compensation should ordinarily be made to one for improvements made after knowledge of the fact that his title is disputed: *Horton v. Sledge*, 29 Ala. 478, 498; though under the statute of Wisconsin a defendant in ejectment is entitled to the value of improvements made by him, even after notice of the plaintiff's claim, on a recovery against him, where he entered into possession of the premises under color of title asserted in good faith: *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795, 41 N. W. 439; and by the express terms of the South Carolina statute a claimant, after a verdict against him for the recovery of land, is entitled to compensation for "all" improvements placed thereon by him, where he supposed, at the time of his purchase, that he had a good title in fee, not excluding those made after subsequent knowledge of title in another: *Templeton v. Lowry*, 22 S. C. 389. One is not entitled to an allowance for improvements before he has color of title. He is not entitled to credit for improvements made in expectation of getting title: *Snell v. Mehan*, 80 Iowa, 53, 45 N. W. 398; *Wheeler v. Merriman*, 80 Minn. 372, 15 N. W. 665; *Thomas v. Thomas*, 69 Miss. 564, 13 South. 666; *Anderson v. Williams*, 59 Ark. 144, 26 S. W. 818; *Tripp v. Fausett*, 94 Ga. 330, 21 S. E. 572; but see *Duckett v. Duckett* (Md., Feb. 1891), 21 Atl. 323. A mistake in a boundary is not a foundation for a possession in good faith, where the party claiming to have made the mistake failed to employ the legal means of information as to his limits after he had notice of an adverse claim to the land: *Sartain v. Hamilton*, 12 Tex. 219, 62 Am. Dec. 524; but if the mistake was not caused by the negligence of the defendant, he would be entitled to compensation for his improvements, less the value of the use and occupation, where the plaintiff knowingly stood by while the improvements were being made and failed to inform the defendant of his right to the land: *Gatlin v. Organ*, 57 Tex. 11. If the United States grants lands in aid of a railroad, and the state is named as trustee for the road, the lands to revert to the United States if the road is not completed in ten years, those who settle on such lands, in the face of the grant, cannot hold against the railroad company, and are possessors in bad faith, though the settlements are made in

contemplation of homestead entries and after the ten year limit and the noncompletion of the road within that period: *Vicksburg etc. R. R. Co. v. Elmore*, 46 La. Ann. 1237, 15 South. 701. If a person buys property without examining the land records, which plainly show the infirmity of the title he is purchasing, and that the true title is outstanding in some one else, he is not, as against the lawful owner, a purchaser in good faith: *Anderson v. Reid*, 14 App. D. C. 54; *Parrish v. Jackson*, 69 Tex. 614, 7 S. W. 486; but see *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. Rep. 303; *Wheeler v. Merriman*, 30 Minn. 372, 15 N. W. 665. That constructive notice of a deed, without actual notice of an adverse title, does not prevent a claim for improvements, see *Whitney v. Richardson*, 31 Vt. 300; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701; *Justice v. Baxter*, 93 N. C. 405; contra, *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564. If a grantee makes a purchase, supposing his title to be good in fee, the fact that he afterward receives notice that it is doubtful does not preclude him from recovering compensation for improvements made after such notice: *Whitney v. Richardson*, 31 Vt. 300. "Color of title in fee," in the Minnesota statute, means color of title in fee in the occupying claimant himself or in the person under whom he claims: *Hall v. Torrens*, 32 Minn. 527, 21 N. W. 717; *Wheeler v. Merriman*, 30 Minn. 372, 15 N. W. 665. Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed and apt words for their conveyance, gives color of title: *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701.

A claimant of land is not entitled to credit for his improvements placed thereon, under the occupying claimant laws, without he has possession: *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. 858; *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701. A defendant is entitled to credit for the value of his improvements, whether the plaintiff's claim is equitable or legal: *Barker v. Owen*, 93 N. C. 198; but he must file a claim therefor: *Newago etc. Mfg. Co. v. Echlinaw*, 81 Mich. 416, 45 N. W. 1010; before or at the time of entry of judgment for the plaintiff in some of the states: *Klever v. Seawall*, 65 Fed. 373; and in others before the judgment is executed: *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 180; *Casey v. Cooper*, 99 N. C. 395, 6 S. E. 653; *Condry v. Cheshire*, 88 N. C. 375. In Florida and Missouri there must be a judgment for the plaintiff in ejectment before the defendant can claim compensation for his improvements: *Asia v. Hiser*, 22 Fla. 378; *Henderson v. Langley*, 76 Mo. 226. In Pennsylvania the defendant must make his claim for improvements in the ejectment suit, or by way of defense to an action for mesne profits. The plaintiff cannot, after a recovery upon his legal title, be compelled by a bill in equity to account for the value of the improvements placed upon the land by the defendant: *Fricke v. Safe Deposit etc. Co.*, 183 Pa. St. 271, 38 Atl. 601. In Arkansas a successful plain-

tiff must pay the judgment for improvements before he can recover possession of the premises: *Douglass v. Sharp*, 64 Ark. 645, 44 S. W. 221; and in Alabama a purchaser who claims an allowance for improvements made by him on the land forfeits such claim by refusing to appoint a referee to ascertain their value: *Steele v. Hanna*, 91 Ala. 100, 9 South. 174; nor is a defendant entitled to credit for improvements where all his interests therein have been divested by judicial sale prior to the request for a jury to assess the value of the improvements: *La Bonty v. Lundgren*, 58 Neb. 648, 79 N. W. 551. An occupying claimant, who is made a defendant in an action to quiet title in another, cannot, in that action, set up his claim for improvements: *Buck v. Holt*, 74 Iowa, 294, 37 N. W. 377. The Arkansas statute, providing, in substance, that an occupant of land, who has made improvements thereon, in good faith, claiming the land under color of title, may recover their value, contemplates antecedent litigation to recover the land from such occupant before he can claim an allowance for his improvements: *White v. Stokes*, 67 Ark. 184, 53 S. W. 1060. It is no defense to an occupant's claim for compensation for improvements under the betterment act that the owner of the land is an infant: *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701. Improvements made during a permissive holding are not within the purview of the betterment acts: *Wisdom v. Reeves*, 110 Ala. 418, 18 South. 13; but a divisional share of betterments may be assessed when a demandant recovers only an undivided share of the estate: *Chandler v. Shaw*, 77 Me. 84. A claim for betterments must show their nature: *Clewis v. Hartman*, 71 Ga. 810; and the claimant is not entitled to credit for improvements made by a former owner: *Aultman v. Uttsey*, 41 S. C. 304, 19 S. E. 617. The statutory proceeding to recover compensation for improvements put upon land in good faith by an occupying claimant is remedial in its character, and should be liberally construed for the purpose of securing an equitable and fair adjustment of the rights of the parties: *Cox v. McDivit*, 125 Mo. 358, 28 S. W. 597; and see *Whitney v. Richardson*, 30 Vt. 300; *McKinly v. Holliday*, 10 Yerg. 477. A right to chattels on land is not involved in an action for improvements brought by a defendant in ejectment: *Brown v. Baldwin*, 121 Mo. 106, 25 S. W. 858.

Another feature of some of the betterment laws is an option given to an owner of land, after a recovery in ejectment or other action, either to take the land on paying for the improvements, or to take the amount of its value in money without the improvements. This secures to the owner the property in the land, and at the same time protects the occupying claimant in his equitable claim to credit for his improvements, and is constitutional: *McCoy v. Grandy*, 3 Ohio St. 463; *Barker v. Owen*, 93 N. C. 198, 204; *Troxell v. Stevens*, 57 Neb. 320, 77 N. W. 781; *Leighton v. Young*, 52 Fed. 439; *McKenzie v. Cook*, 113 Mich. 452, 71 N. W. 868; *Jewell v.*

Truhn, 38 Minn. 433, 38 N. W. 106; Kibbe v. Campbell, 34 La. Ann. 1163; Stephens v. Ballou, 27 Kan. 594; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. Rep. 962; Stump v. Hornback, 94 Mo. 26, 6 S. W. 356; Cox v. McDivitt, 125 Mo. 358, 28 S. W. 597; Griswold v. Bragg, 18 Blatchf. 202, 48 Conn. 577, 48 Fed. 519; but a provision for a transfer of the land to the occupying claimant without the consent of the owner would plainly violate the constitutional guaranty as to private property: McCoy v. Grandy, 3 Ohio St. 463; and see Barker v. Owen, 93 N. C. 198, 204. The possessor remains the owner of his improvements until the land owner makes his election: Kibbe v. Campbell, 34 La. Ann. 1163. It is only where the plaintiff in ejectment elects to relinquish the land to the occupying claimant and to recover its value, aside from the improvements, that the court is authorized to render judgment that the occupying claimant shall take the land and pay the plaintiff its ascertained value: Stump v. Hornback, 94 Mo. 26, 6 S. W. 356. An unsuccessful occupant cannot be ousted of possession until there has been an election to receive the value of the property, or to pay the value of the improvements, and a compliance therewith: Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781; and if the land owner fails to pay, within the time prescribed by statute, the amount awarded to the occupant for improvements, the title becomes vested in the occupant: Craig v. Dunn, 47 Minn. 59, 49 N. W. 396. It is also a rule in equity that if the owner of land stands by and permits another to expend his money in improving it, he may be compelled to surrender his title on receiving compensation, or else to pay for the improvements, where he, by his conduct, encouraged the other to make the improvements, or so conducted himself while they were being placed upon the land as to make it a fraud in him to take them without paying their value: Crest v. Jack, 3 Watts, 238, 27 Am. Dec. 353; but an evicted claimant who was not a bona fide purchaser cannot recover compensation for his improvements, where the owner had no knowledge of the fact of improvements, before or at the time they were made, although he was cognizant of the fact after they had been completed and failed to notify the claimant of his title: Hall v. Hall, 30 W. Va. 779, 5 S. E. 260.

Mere trespassers on property are not upon eviction entitled to credit or compensation for their improvements placed thereon, as they are not holders in good faith: Nesbitt v. Walters, 38 Tex. 576, 579; Stille v. Shull, 41 La. Ann. 816, 6 South. 634; New Orleans etc. Assn. v. Jones, 68 Ala. 48; Stamper v. Bradley (Ky., Oct. 1899), 53 S. W. 16. Improvements made by trespassers become a part of the land and the property of him who holds the title: Carpenter v. Mitchell, 29 Cal. 330, 335. A trespasser who makes improvements on another's land has no right to remove them: Fischer v. Knorr, 106 Iowa, 181, 76 N. W. 658.

Ejectment—Setoff of Improvements—Trespass to Try Title.—Except where it is otherwise provided by statute, the value of improvements made by a bona fide occupant can be allowed in courts of law only as a setoff against the claim of the owner for rents and profits, and only to the extent of such rents and profits: See the monographic note to *Jackson v. Loomis*, 15 Am. Dec. 352, discussing compensation for improvements in ejectment; note to *Pitt v. Moore*, 6 Am. St. Rep. 496; *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572; *Nunnally v. Owens*, 90 Ga. 220, 15 S. E. 705; *Dudley v. Johnson*, 102 Ga. 1, 29 S. E. 50; *Dean v. Feely*, 69 Ga. 804; *Kerr v. Nicholas*, 88 Ala. 346, 6 South. 698; and in numerous cases in equity this appears to be the limit of recovery: *Jackson v. Loomis*, 4 Cow. 168, 15 Am. Dec. 347, and note; *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Bryan v. Lofftus*, 1 Rob. (Va.), 12, 39 Am. Dec. 242; *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *McIntire v. Pryor*, 10 App. D. O. 432; *Nunn v. Burger*, 76 Ga. 706; *Dudley v. Johnson*, 102 Ga. 1, 29 S. E. 50; *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71. But in other cases courts of equity have held that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has by his improvements and mellorations added to the permanent value of the estate, he is entitled to a "full" remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land: Note to *Pitt v. Moore*, 6 Am. St. Rep. 496; *Dilworth v. Sinderling*, 1 Binn. 488, 2 Am. Dec. 469; *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742; *Taylor v. James*, 109 Ga. 327, 34 S. E. 674. The matter of improvements, however, is regulated to a great extent by the betterment acts, which embody the equitable principle that a defendant, holding possession under color of title in good faith, is allowed full value for his improvements and the plaintiff full rent for his land. In other words, if the value of the improvements exceeds the amount of rents and profits, the defendant is entitled, in an action brought to recover the land, to compensation for such excess, at least so far as it has enhanced the value of the property: *Turnipseed v. Fitzpatrick*, 75 Ala. 297; *Mills v. Geer*, 111 Ga. 275, 36 S. E. 673; *Stebbins v. Guthrie*, 4 Kan. 353; *Kerr v. Nicholas*, 88 Ala. 346, 6 South. 698; *Dean v. Feely*, 69 Ga. 804; *Hollingsworth v. Funkhouser*, 85 Va. 448, 8 S. E. 592; *Strother v. Reilly*, 105 Tenn. 48, 58 S. W. 832; *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459; but see *Bailey v. Hastings*, 15 N. H. 525.

In California the statute permits an allowance for improvements, made by a bona fide possessor in good faith, only to the extent of being used as a setoff to damages for withholding the property recovered: *Ford v. Holton*, 5 Cal. 319; *Welch v. Sullivan*, 8 Cal. 511; *Love v. Shartzer*, 31 Cal. 487; *Carpentier v. Small*, 35 Cal. 346; and

in the state of Washington the statute permits the value of the improvements to be set off only as against damages for the detention: *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250; but such damages are measured by the value of the rents and profits up to the time the judgment is rendered: *Love v. Shartzler*, 81 Cal. 487. The right to offset improvements in actions of ejectment depends in part upon whether they were made in good faith and under color of title: *Carpentier v. Small*, 85 Cal. 346, 355; *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 272; *Dothage v. Stuart*, 85 Mo. 251; *Nourse v. Turnham*, 1 Bibb, 62; *Seymour v. Cleveland*, 9 S. Dak. 94, 68 N. W. 171; and before the title of the plaintiff accrued: *Bay v. Pope*, 18 Cal. 694; and upon whether the improvements are permanent or not: *Carpentier v. Small*, 85 Cal. 346, 355; *Stark v. Starr*, 1 Saw. 15, Fed. Cas. No. 13,307. The improvements must also add to the future value of the property for the ordinary purposes for which it is or may be used: *Stark v. Starr*, 1 Saw. 15, Fed. Cas. No. 13,307; and must have been made where the holding was adverse: *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 272. In an action for mesne profits against a bona fide possessor under claim of right, he should be allowed for improvements made by him to the extent that they have increased the value of the premises, and will not be restricted to the value of the improvements themselves: See the extended note to *Barrett v. Strahl*, 9 Am. St. Rep. 805, where numerous authorities are cited; also compare *Gill v. Patten*, 1 Cranch C. O. 465, Fed. Cas. No. 5,428; *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71. But a defendant in ejectment who desires to set off the value of his improvements against mesne profits must assert his right by proper averments in his answer, or he will be precluded from doing so at the trial: *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738; and cannot afterward assert his claim in equity: *Moody v. Harper*, 38 Miss. 599. In Indiana the defendant, in an action to recover real property, may set off improvements made in good faith to the extent of damages for the detention, but further than this he must wait until the question of title is determined, and then bring his action under the statute concerning occupying claimants: *Wernke v. Hazen*, 32 Ind. 431.

Improvements made on another's land on the faith of an actual disclaimer of title should not be disturbed in an action of ejectment: *Robinson v. Justice*, 2 Penr. & W. 19, 21 Am. Dec. 407; and in a writ of entry compensation to a disseisee for his buildings and improvements, where the disseisin has continued for twenty years, is an absurdity, for the disseisor has obtained a title in fee: *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486. The fact that a deed to premises limits their use to a particular purpose does not prevent it from constituting color of title in ejectment: *Petit v. Flint etc. R. R. Co.*, 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. 554.

In trespass for title a bona fide occupant who enters and claims under color of title and who has made permanent and valuable improvements may offset the same, against a claim for rents, by virtue of the statute: *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049; but there should be no allowance for improvements made after suit: *Henderson v. Ownby*, 56 Tex. 647, 42 Am. Rep. 691. The right to recover the value of improvements placed upon the land of another does not arise wholly from the statute respecting the trial of title, but exists under the principles of equity independent of such statute: *Wood v. Cahill*, 21 Tex. Civ. App. 38, 50 S. W. 1671.

Rule in Estimating Damages—Enhanced Value.—Compensation for improvements will not be allowed where they are not permanent, and where they do not enhance the value of the land. The true measure of a defendant's recovery for improvement is, therefore, not the cost of making them, but the enhancement in the value of the land, to the true owner, by reason thereof: See the principal case; *Hicks v. Blakeman*, 74 Miss. 459, 21 South. 7, 400, and numerous cases therein cited: *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93; *Vaughan v. Cravens*, 1 Head, 108, 73 Am. Dec. 163; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; *Harman v. Harman*, 54 S. C. 100, 31 S. E. 881; *Lothrop v. Michaelson*, 44 Neb. 633, 68 N. W. 28; *Bacon v. Thornton*, 16 Utah, 138, 51 Pac. 153; *Pearson v. Gooch*, 69 N. H. 571, 45 Atl. 406; *Cosgrove v. Merz* (R. I., May, 1897), 87 Atl. 704; *McKinly v. Holliday*, 10 Yerg. 477; *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. 1081; *Carolina etc. R. R. Co. v. McCaskill*, 98 N. C. 526, 4 S. E. 463; *McMurray v. Day*, 70 Iowa, 671, 28 N. W. 476; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 34 N. E. 476; note to *Jackson v. Loomis*, 15 Am. Dec. 352; *Henderson v. Astwood*, [1894] A. C. 150; but see *Gleiser v. McGregor*, 85 Iowa, 480, 52 N. W. 366; *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 89. This rule is sanctioned by statute in some of the states, but is the same independently of the statute.

A defendant in an action to recover land is entitled to give evidence of improvements: *Baldwin v. Cullen*, 51 Mich. 33, 16 N. W. 191; for without evidence nothing can be allowed for improvements: *Wise v. Burton*, 73 Cal. 174, 14 Pac. 633; and the defendant, to recover for improvements, must show the value of the land without the improvements, since his right is only to recover the difference between the value of the land with, and its value without, improvements: *Thomas v. Quarles*, 64 Tex. 491. Evidence of the cost of improvements, irrespective of their effect upon the value of the land, should be excluded: *Fletcher v. Brown*, 35 Neb. 660, 53 N. W. 577; or disregarded: *Fisher v. Edington*, 85 Tenn. 23, 1 S. W. 499; for the defendant will not be restricted to the value of the improvements themselves: *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459. The improver must be charged for the property in its condition before his improvements: *Williamson v. Jones*, 43 W.

Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411; and, on the other hand, in no case can the value of the improvements be deducted from the rents which the land would have produced without the improvements: *Smith v. Bell*, 91 Ky. 655, 25 S. W. 752; nor can an occupant be made to account for so much of the value of the use and occupation as has accrued from the improvements made by him in good faith: *Bitner v. New York etc. Land Co.*, 67 Tex. 341, 3 S. W. 301. The value of improvements to which a good faith occupant is entitled upon ejectment is to be determined by the actual relative value of the land with or without the improvements, and not by their cost or peculiar value to the occupant, or what they may be worth to the plaintiff for the purposes to which he intends to devote the property: *Petit v. Flint etc. R. R. Co.*, 119 Mich. 492, 75 Am. St. Rep. 417, 78 N. W. 554; *Carolina etc. R. R. Co. v. McCaskill*, 98 N. C. 526, 4 S. E. 468; *Stark v. Starr*, 1 Saw. 15, Fed. Cas. No. 13,307. The enhanced value is to be computed, not at the time the improvements were erected, but at the time of the recovery: *Taylor v. James*, 109 Ga. 327, 34 S. E. 674; and no credit is to be made for ordinary repairs, which only maintain the value: *Citizens' Bank v. Miller*, 44 La. Ann. 199, 10 South. 779. Nor should interest be included in estimating the value of improvements: *Pugh v. Bell*, 2 T. B. Mon. 125, 15 Am. Dec. 142. Neither should a party in possession, who is allowed the value of his improvements, be allowed interest thereon from the time of filing the decree: *Boykin v. Ancrum*, 28 S. C. 480, 13 Am. St. Rep. 698, 6 S. E. 305.

Improvements on Estates of Decedents.—An executor of a will is not entitled to an allowance for improvements put by him on land devised by the testator, where his claim of title was inconsistent with the provisions of the will: *Jones v. Swearingen*, 42 S. C. 58, 19 S. E. 947; but where a sale made by an administrator to himself is set aside upon a bill filed by the heirs for that purpose, it is proper to allow the administrator compensation for improvements which have substantially benefited the estate, upon the principle that he who seeks equity must do equity: *Lagger v. Mutual etc. Bldg. Assn.*, 146 Ill. 283, 33 N. E. 946.

Improvements on Property Fraudulently Conveyed.—A fraudulent grantee, upon losing title, is not entitled to an allowance for improvements made by him upon the premises: *Hawley v. Tesch*, 88 Wis. 213, 59 N. W. 670. But a wife who spends money in improving property under an agreement that it shall be deeded to her and her husband is entitled to a lien thereon for the amount so expended, superior to that of the husband's general creditors, where she is ignorant of any fraudulent intent in the matter: *Marmion v. White*, 151 Ind. 445, 51 N. E. 930. So if a debtor fraudulently conveys a house and lot, and the building, upon being destroyed by fire, is restored in part with the money of the grantee's

partner, who was not implicated in the fraud, such partner will be allowed a lien for the money so advanced, where the conveyance is set aside at the suit of creditors: *Voorhels v. Blanton*, 89 Fed. 885, 83 Fed. 234.

Improvements on Land Sold by Guardian—Ward's Estate.—If land is sold at a guardian's sale, which is void, one who enters thereon under a deed from the guardian, honestly believing that he has a good title and making improvements on the land, should be allowed compensation therefor: *Hicks v. Blakeman*, 74 Miss. 459, 21 South. 7. A guardian who puts expensive, permanent improvements on a ward's estate during his minority, and without authority of the probate court, is not legally entitled to any credit therefor if the ward elects to repudiate the act; though the court may, in the exercise of its equity powers, make an allowance for such improvements on the ground that the value of the ward's estate has been enhanced thereby: *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609. Compare the subdivision, *infra*, concerning judicial sales.

Improvements on Homesteads.—When land is selected for university purposes, under congressional grant, a person who subsequently files a homestead entry thereon is not a bona fide occupant under color of title, entitling him to the value of his improvements made on the land: *Brygger v. Schweitzer*, 5 Wash. 564, 33 Pac. 388. See *Swetman v. Sanders*, 85 Tex. 294, 20 S. W. 124. A holding under an invalid certificate of homestead entry is not a holding "by color of title," such as will authorize an allowance for improvements: *Whitcomb v. Provost*, 102 Wis. 278, 78 N. W. 432; and see *Brygger v. Schweitzer*, 5 Wash. 564, 33 Pac. 388. A homestead settler upon a tract of government land, whose entry is afterward canceled, may remove his improvements when the land is awarded to an adverse settler: *Winans v. Beldler*, 6 Okla. 603, 52 Pac. 405. See the subdivision, *infra*, concerning public lands.

Improvements on Property Sold at Judicial Sale.—A defeated bona fide purchaser at a judicial sale is entitled to an allowance for his improvements put upon the property in good faith: *Hicks v. Blakeman*, 74 Miss. 459, 21 South. 7; *Thompson v. Buckner* (Ky., May, 1897), 40 S. W. 915. If a purchaser at a judicial sale buys in good faith, believing that he is getting a perfect title, he is entitled, upon a redemption of the property, to a credit for improvements made thereon: *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452. In an action to recover land from the purchaser at a void executor's sale, no allowance can be made, in California, for improvements except as an offset for damages claimed for withholding the possession: *Huse v. Den*, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790. Statutes relating to allowances to good faith occupying claimants for improvements and betterments of property purchased at judicial sales have no application to a personal action

brought to recover the value of property purchased at a judicial sale, which property is alleged to have been so changed pending appeal as to be practically destroyed: *Central Trust Co. v. Hubinger*, 87 Fed. 8, 7. Compare the subdivision, *supra*, concerning guardian's sale, and the subdivisions, *infra*, relative to mortgaged property and partition.

Improvements on Leased Property.—A tenant is not entitled to any allowance from his landlord for permanent and valuable improvements erected by him on the leased premises without the consent of the landlord: *Jones v. Hoard*, 59 Ark. 42, 43 Am. St. Rep. 17, 28 S. W. 193; *Windon v. Stewart*, 48 W. Va. 711, 28 S. E. 776; *Guay v. Kehoe* (N. H., March, 1900), 46 Atl. 688; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. 612; *Wolf v. Holton*, 92 Mich. 136, 52 N. W. 459; *Dulaney v. Nolan Co.*, 85 Tex. 225, 20 S. W. 70. Improvements made by a tenant at will inure to the benefit of the landlord: *Pomeroy v. Lambeth*, 1 Ired. Eq. 65, 36 Am. Dec. 83; *Howe v. Logwood*, 8 A. K. Marsh. 388. And a tenant who disclaims his landlord's title and asserts title in himself in an action at law cannot, when defeated in that action, afterward obtain, in a court of equity, compensation for his improvements: *McQueen v. Choteau*, 20 Mo. 222, 64 Am. Dec. 178. Compensation for improvements will not be allowed where they are made by a party holding possession under a void lease: *Vaughan v. Cravens*, 1 Head, 108, 73 Am. Dec. 163. Even where a tenant relies upon the statute, and claims betterments on the ground that he held the premises under a title which he had reason to believe good, no allowance will be made to him for improvements where he holds, with notice, land conveyed in fraud of creditors, unless he makes his claim before a verdict in favor of the party recovering from him: *Livermore v. Bouteille*, 11 Gray, 217, 71 Am. Dec. 708.

Improvements made under a parol contract to lease may be compensated for in damages: *Findley v. Wilson*, 3 Litt. 390, 14 Am. Dec. 72. A lessee who makes permanent improvements upon the demised premises, under a contract that he shall be paid for them at the expiration of the term, may, however, seek relief in equity as well as at law, for the value of the improvements constitutes an equitable lien upon the premises, which alone entitles the party to relief in equity: *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 56. If the tenant has made improvements on land under a contract with the owner, he will not be allowed for them in an action of ejectment brought by a devisee, but must seek his compensation from the personal representatives of the deviser: *Van Alen v. Rogers*, 1 Johns. Cas. 281, 1 Am. Dec. 113. A party who repairs buildings on leased premises under a contract with the tenant, but without authority or contract, express or implied, from the landlord to pay therefor, is not entitled to an equitable lien on the premises for the value of the

improvements, if the lease is declared forfeited for nonpayment of rent as provided for therein, subsequently to the time when the improvements are completed: *Williams v. Vanderbilt*, 145 Ill. 238, 38 Am. St. Rep. 486, 34 N. E. 476. An equitable lien upon land for improvements thereon cannot be maintained unless they were made for the benefit of the land, and do benefit it. Hence the rule does not apply to a case where it is agreed between the lessor and lessee that structures erected on the leased premises may be removed at the option of the lessee, and that they shall not be considered as attached to the land: *Phillips v. Reynolds*, 20 Wash. 374, 72 Am. St. Rep. 107, 55 Pac. 316. If a lessee covenants to erect a building on the demised premises, and the lessor agrees to either pay for it at the end of the term or to renew the lease, the title to the building erected vests at once in the lessor, subject, however, to the lessee's rights under the lease: *Bass v. Metropolitan etc. R. R. Co.*, 82 Fed. 857. Compare *Tuttle v. Leiter*, 82 Fed. 947, respecting the construction of a covenant to purchase improvements.

Improvements on Property Held Under a License.—To support a claim for improvements put upon the property of another, it should at least appear that the occupant acted upon a belief as to his title, having some probable basis; or that the real owner, knowing of the improvements, suffered them to go on without notifying the occupant of the true condition of the title. Hence, no such claim could be founded on an entry made upon land under the mere permission of one standing in no relation of ownership or of agency for the owner: *Bohn v. Hatch*, 183 N. Y. 64, 30 N. E. 659. But when a party has been permitted by the owner to enter upon land under an agreement that he may do so and erect improvements thereon, and that he will be allowed to purchase such land for a small or nominal consideration, and such agreement is not enforceable, because both parol and uncertain in its terms, and the license given to him to occupy is revoked, both he and the owner of the land must be treated as having an interest therein, and the improver should be allowed the value of his improvements; furthermore, such value should be made a lien on the property and unless it is paid into court for his use the property should be sold, and the proceeds divided between him and the land owner in proportion to their respective interests: *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407.

Improvements on Property Held by a Life Tenant.—A tenant for life cannot charge either the remainderman or the estate for improvements on land in which he holds the life estate: *Thurston v. Dickinson*, 2 Rich. Eq. 317, 46 Am. Dec. 56; *Springfield v. Bethel*, 90 Ky. 593, 14 S. W. 592; *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105; *Wilson v. Parker* (Miss., Jan. 1894), 14 South. 284. Even though he made the improvements upon the false assumption that he had

an absolute title to the property: *Henry v. Brown*, 99 Ky. 13, 34 S. W. 710; and see *Taylor v. Kemp*, 86 Ga. 181, 12 S. E. 296. A remainderman, in case of a life tenancy, is entitled to the property, with all improvements thereon, at the expiration of the tenancy; and no agreement as to buildings between the tenant for life and his lessee will bind the remainderman. When a life tenant has leased to another person a town lot used only for building purposes, the lease, though unexpired, terminates with the death of the life tenant. Hence, the lessee cannot, after that time, remove buildings erected by him on the lot without the consent of the remainderman, during the continuance of the tenancy and lease, as such buildings are a part of the realty and go to the remainderman: *Jones v. Shufflin*, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975. A purchaser of land must take notice of his title as being a life estate or a fee when that title is disclosed by the records. If he purchases a life estate and erects permanent improvements, he cannot charge the remainderman with their value upon the termination of the life estate: *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538, 5 South. 387. In ejectment, the grantee of a life tenant by quitclaim deed cannot counterclaim for the value of improvements made by him on the premises while holding under such deed, as against the owner of the fee: *Falck v. Marsh*, 88 Wis. 680, 61 N. W. 287; and the value of improvements made by a life tenant, while in possession of land, cannot be recovered as a setoff in an equitable action by the remainderman to enforce the payment of a debt which such life tenant owes him. The principle that he who seeks equity must do equity cannot properly be applied in such a case: *Sparks v. Ball*, 91 Ky. 502, 34 Am. St. Rep. 236, 16 S. W. 272.

Improvements on Mortgaged Property.—A creditor is not allowed to improve the debtor out of his estate, but where a mortgagee takes possession, not only by the consent, but at the instance, of the mortgagor, and makes permanent and beneficial improvements, in the belief that the estate is his own, and without which it would be wholly unproductive, he is entitled to an allowance therefor: *Gillis v. Martin*, 2 Dev. Eq. 470, 25 Am. Dec. 729. A purchaser of property subject to a mortgage is entitled to an allowance for improvements placed thereon by him to the extent that they have enhanced the value of the security: *Citizens' Bank v. Miller*, 44 La. Ann. 199, 10 South. 779. If a purchaser of property, sold under mortgage foreclosure proceedings, buys in good faith, believing that he is getting a good title, he is entitled upon a redemption of the property to a credit for improvements made thereon by him in good faith, so far as they have enhanced the value of the property: *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; *Martin v. Ratcliff*, 101 Mo. 254, 20 Am. St. Rep. 605, 13 S. W. 1051; *Brighton v. Doyle*, 64 Vt. 616, 25 Atl. 694; *Bradley v. Snyder*, 14 Ill. 263, 58

Am. Dec. 564; *Williams v. Rouse*, 124 Ala. 100, 27 South. 16; *Henderson v. Astwood*, [1894] A. C. 150; *Prichard v. Sweeney*, 109 Ala. 651, 19 South. 730; though they may exceed those which a mortgagee in possession is ordinarily justified in making. The rule that a mortgagor cannot be improved out of his estate does not apply to such a case: *Martin v. Ratcliff*, 101 Mo. 254, 20 Am. St. Rep. 605, 13 S. W. 1051. The purchaser must, of course, account for the rents and profits which he has enjoyed: *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564. If a sale under a power in a mortgage is set aside as irregular and void, and the mortgagor's assignee in insolvency files a bill to redeem from the mortgage, the purchaser at such sale is entitled to credit for improvements put by him upon the property, in good faith, so far as they have enhanced its value: *Pearson v. Gooch*, 69 N. H. 571, 45 Atl. 406. So where a second mortgagee, who has purchased the property, seeks to set aside an execution sale under a judgment against the mortgagor, but such sale is confirmed as to a part of the property, the purchaser is entitled to the value of improvements placed by him upon such part in ignorance of the sale: *Kilmer v. Garlick*, 185 Ill. 406, 56 N. E. 1103. A purchaser in good faith of real estate at a judicial sale, after the foreclosure of a senior mortgage, is entitled to credit for improvements as against junior mortgagees, although the latter were not parties to the foreclosure suit: *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211, 39 N. W. 418.

A mortgagee in possession of land is not entitled to compensation for improvements made upon the mortgaged premises further than is necessary to keep them in repair. He is not entitled to pay for permanent improvements made without the mortgagor's consent, and is chargeable only with such rent as the land would have yielded without the improvements: *Robertson v. Read*, 52 Ark. 381, 20 Am. St. Rep. 188, 14 S. W. 387; *White v. Atlas Lumber Co.*, 49 Neb. 82, 68 N. W. 359. One standing in the position of a mortgagee of land in possession before foreclosure may add to the mortgage debt any excess of expenditure for necessary repairs over and above rents and profits; but if he neglects to make such claim on foreclosure, he is bound by the decree, and cannot subsequently make such repairs a lien on the premises: *Dewey v. Brownell*, 54 Vt. 441, 41 Am. Rep. 852. A mortgagee who buys at his own sale, and who has legal notice of a defect in his title, should not be credited with betterments: *Southerland v. Merritt*, 120 N. C. 318, 26 S. E. 814; but a mortgagee should not be charged with rents accruing from improvements made by himself: *Gillis v. Martin*, 2 Dev. Eq. 470, 25 Am. Dec. 720. A mortgagee, upon redemption, is not entitled to an allowance for permanent improvements, not necessary for the preservation of the property, and made without the mortgagor's consent: *Bradley v. Merrill*, 88 Me. 319, 34 Atl. 160; 91 Me. 840, 40 Atl. 132; and see *Ensign v. Batterson*, 68 Conn. 298, 36 Atl.

51. "If the rule were otherwise," says Foster, J., in *Bradley v. Merrill*, 98 Me. 319, 34 Atl. 160, "it would be subject to great abuses, and would increase the difficulties in the way of the right to redeem, and would oftentimes be resorted to by unscrupulous mortgagees disposed to take advantage of the necessities of the mortgagor, as a means of defeating his power to redeem." To this rule, however, there are two exceptions: 1. Where improvements have been made by the mortgagee under a bona fide but mistaken supposition that he is the absolute owner, and that the equity of redemption is barred; 2. Where the mortgagee has reason to believe, from the form of his conveyance or the circumstances of his purchase, that he is the absolute owner: *Bradley v. Merrill*, 98 Me. 319, 34 Atl. 160; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51. One who buys property sold under foreclosure proceedings with notice of the rights of other parties is not a purchaser in good faith, and is not, upon a redemption of the property, entitled to an allowance for improvements made thereon by himself: *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452. Compare the subdivision, *supra*, concerning judicial sales.

Improvements on Property of Cotenants—Partition.—The subject of compensation for improvements as between cotenants in suits for partition is treated at some length in the note to *Ward v. Ward*, 52 Am. St. Rep. 924-941, discussing the liability of one cotenant to another for rents and profits received from, and for expenditures made upon, their common property. The same subject is also discussed in the valuable case of *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48, and little else is necessary here than to cite some later cases. At the common law, a tenant in common who made permanent improvements, as distinguished from ordinary repairs, could not recover from his cotenants any part of his expenditures made for that purpose, unless they were made at the request or with the consent, express or implied, of the latter: *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, 46 N. E. 307; but in equity the rule is more liberal, and an allowance is made on partition, to a tenant in common, whose possession is not wrongful, and who has, without his cotenant's consent, made permanent and valuable improvements on the common property whereby its value has been enhanced: *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241; *Parish v. Camplin*, 130 Ind. 1, 37 N. E. 607. A cotenant who makes substantial improvements on the common property is entitled to have them considered on a petition for partition: *Leavitt v. Locke*, 68 N. H. 17, 40 Atl. 395; and, upon the sale of the property, to have such improvements considered in determining what is a just division of the proceeds: *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384. Equity is effected between cotenants on partition either by assigning the improved part of the property to him who made it, at its value before the improvements were made,

or, if that cannot be done, then by a reasonable allowance to the one who has enhanced the value of the property: *Holt v. Couch*, 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; *Pipkin v. Pipkin*, 120 N. C. 161, 26 S. E. 697. If property held in cotenancy is not susceptible of being divided, the court may, in a suit for partition, order an account before partition, and provide for a suitable compensation for improvements to the tenant making them: *Holt v. Couch*, 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703; or the property should be sold and the proceeds be divided equally among the cotenants, after deducting therefrom, for the benefit of the tenant in possession, such sum as the salable value has been enhanced by such improvements: *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190, 67 N. W. 378.

The remedy to obtain compensation for improvements placed by a tenant in common upon the common property, without the consent of his cotenants, can be asserted, as a general rule, only in a suit for partition: *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733, 26 S. E. 840. The term "betterments" is said, in North Carolina, to have no application to cotenants: *Holt v. Couch*, 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703; and see *Hall v. Boatwright*, 58 S. C. 544, 79 Am. St. Rep. 864, 36 S. E. 1001; but in Arkansas one who improves land in good faith in the belief that he is the owner thereof in severalty is entitled to payment for such improvements by the terms of the betterment act; and his cotenant will not be permitted to recover a moiety of such land, except upon condition of paying his share of the improvements, although the person making the improvements had constructive notice of the plaintiff's title: *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50, 10 S. W. 765. An allowance between cotenants for improvements is not made as a matter of legal right, but purely from the desire of the court to do justice, and must be estimated so as to involve no injury to the cotenant against whom the improvements are chargeable: *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733, 26 S. E. 840. The amount of the allowance, in general, is the enhanced value of the property caused by the improvements: *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, 21 S. E. 746; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77 N. W. 80; note to *Ward v. Ward*, 52 Am. St. Rep. 939; but if, in proceedings in partition between cotenants, one has been in exclusive possession for a number of years, and made valuable improvements, and the excluded tenant is to be allowed for rental, exact equity between the parties requires that the improvements should be charged at cost, as against the charge for rental, when the expenditure for improvements was a disbursement in order to make the premises rentable at the price charged in the accounting: *Fenton v. Miller*, 116 Mich. 45, 72 Am.

St. Rep. 502, 74 N. W. 384. Compensation, however, cannot be allowed in a partition suit for the cost of improvements on adjoining property, which incidentally enhance the value of the common property: Dall v. Confidence etc. Min. Co., 3 Nev. 531, 93 Am. Dec. 419.

A tenant in common, who is also the lessee of his cotenant, will not, when the property cannot be partitioned otherwise than by its sale, be allowed compensation from the proceeds of such sale for improvements placed upon the property during the course of his tenancy, which enhance its value and were made with the knowledge, but without the consent, of his cotenants, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on his business then prosecuted by him upon the premises, and increasing the income therefrom, which was not shared with his cotenants: Cosgriff v. Foss, 152 N. Y. 104, 57 Am. St. Rep. 500, 46 N. E. 307. Improvements not in the nature of repairs cannot be made by one tenant in common upon the common property, and the expense of any part thereof charged to his cotenant: Brown v. Cooper, 98 Iowa, 444, 60 Am. St. Rep. 190, 67 N. W. 378; Middlebury Electric Co. v. Tupper, 70 Vt. 603, 41 Atl. 532. A party who, owning an undivided one-third in fee and a life estate in the whole of a tract of wild land, takes possession under a deed purporting to convey the remaining interest in the fee, but which is afterward determined to be void, and who, while thus in undisturbed possession for twenty years, makes improvements equal to the value of the land, is entitled, in an action of partition brought by him upon discovering the defect in his title, to recover the value of his improvements; and though actual partition cannot be decreed, and a sale must be made, still he need not resort to a court of law to recover the value of his improvements, under the occupying claimant act, but may have relief in equity: Killmer v. Wuchner, 79 Iowa, 722, 18 Am. St. Rep. 392, 45 N. W. 209. The defense that a tenant in common is entitled to the value of improvements placed by him upon the common property should be made when a suit is brought to partition the land: Pierson v. Conley, 95 Mich. 619, 55 N. W. 387. In a suit for partition, the claim of one of the cotenants for compensation for improvements made by him cannot be barred by the statute of limitations: Ballou v. Ballou, 94 Va. 350, 64 Am. St. Rep. 733, 26 S. E. 840. A joint tenant is not entitled at law to compensation for improvements placed by him on the common property without the consent of his cotenants: Crest v. Jack, 3 Watts, 238, 27 Am. Dec. 353. Compare the subdivision, *supra*, concerning judicial sales.

Improvements on Property Purchased Pendente Lite.—There can be no bona fide improvements made on land pending litigation concerning it. Hence, one who makes them, under such circumstances,

does so at his peril, and cannot claim compensation therefor: *Mayer v. Haggerty*, 138 Ind. 623, 38 N. E. 42; *Richwine v. Presbyterian Church*, 135 Ind. 80, 34 N. E. 737; *Davis v. Farwell* (Tex. Civ. App., Jan. 1899), 49 S. W. 656. Contra, *Whitledge v. Wait, Sneed*, 335, 2 Am. Dec. 721. One who makes improvements on land after an action has been brought to try title thereto cannot claim compensation for their value, whether such improvements are new and capable of being removed or consist merely of repairs: *Estate of Gleeson*, 102 Pa. St. 279, 73 Am. St. Rep. 808, 43 Atl. 1032. There can be no allowance for improvements made by a vendee after the institution of a suit by the vendor to rescind the contract of sale: *Thompson v. Kilcrease*, 14 La. Ann. 340.

Improvements on Public Lands, made by a settler thereon with the hope of obtaining title, are at his own risk, for he is not a possessor in good faith: *Gibson v. Hutchins*, 12 La. Ann. 545, 68 Am. Dec. 772. A homestead settler who makes improvements upon a tract of government land, and whose entry is afterward canceled, may remove the same: *Winans v. Beldler*, 6 Okla. 603, 52 Pac. 405; *Bingham Co. etc. Assn. v. Rogers* (Idaho, Feb. 1900), 59 Pac. 931; especially where such cancellation is for fraud: *Calhoun v. McCornack*, 7 Okla. 347, 54 Pac. 493. If a homestead entry has been canceled for fraud in its inception, the entryman cannot avail himself of the benefits of the occupying claimant act, passed by Congress June 1, 1874, concerning improvements made in good faith under color of title: *Woodruff v. Wallace*, 3 Okla. 355, 41 Pac. 357; *Calhoun v. McCornack*, 7 Okla. 347, 54 Pac. 493. That act has no application to land until the title to it passes from the United States: *Woodruff v. Wallace*, 3 Okla. 355, 41 Pac. 357. Compare *Chavez v. Chavez de Sanchez*, 7 N. Mex. 58, 32 Pac. 137. One who enters a homestead, with a full knowledge of the facts, while an appeal in a decision concerning the land is pending, is not a good faith holder, and is not entitled to compensation for his improvements: *Vilas v. Prince*, 88 Fed. 682. So if a homestead entry is allowed by inadvertence, but the entryman is notified that it will be canceled, any improvements subsequently placed upon the land by him pending an appeal are made at his own risk, and no compensation can be allowed therefor: *Smith v. Arthur*, 7 Wash. 60, 34 Pac. 433.

To obtain compensation for improvements placed upon state lands, such as school lands, the possession thereof must have been in good faith: *Baker v. Millman*, 77 Tex. 46, 13 S. W. 618; *Thompson v. Comstock*, 59 Tex. 318. As to the recovery of the value of improvements placed upon school lands purchased under the statutes of the state of Washington, see *Hart Lumber Co. v. Rucker*, 15 Wash. 453, 46 Pac. 723; 20 Wash. 383, 55 Pac. 320. The occupant of state school lands waives his right to an allowance for improve-

ments placed thereon by him if he elects to remove them: *Luse v. Rankin*, 57 Neb. 632, 78 N. W. 258. Equity requires, under the statute of Michigan, that an occupant of swamp land, who has drained it, should be compensated therefor, where his title fails: *Sherman v. Cook Co.*, 98 Mich. 61, 57 N. W. 23. So, in Arkansas, where the state seeks to cancel its patent and to recover the possession of lands held thereunder, equity requires it to pay the value of the defendant's improvements, less the rents and profits with which he ought to be charged: *State v. Morgan*, 52 Ark. 150, 12 S. W. 243. The betterment act of Arkansas is held not to apply to land belonging to the state. Hence the value of improvements made upon land forfeited to the state for nonpayment of taxes cannot become a charge thereon as against one who subsequently purchases from the state: *Martin v. Roesch*, 57 Ark. 474, 21 S. W. 881.

Improvements on Property Held in Trust.—Whether a trustee who places improvements upon property is entitled to compensation therefor depends, to a great extent, upon the powers which have been conferred upon him. Trustees invested with a general power to manage and control the property of the cestui que trust are justified in laying out money for the repair and ordinary improvement of property, such as draining, fencing, necessary farm buildings, etc., and they are allowed to hold the estate until the moneys thus expended are repaid; and the question of reimbursement does not depend upon the knowledge or consent of the cestui que trust: *Woodard v. Wright*, 82 Cal. 202, 22 Pac. 1118; and compare *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965, showing when a life beneficiary of a trust estate under a will is entitled to an allowance for the value of permanent improvements added by him to the trust property, and when he is not entitled to compensation for improvements made by a lessee of the beneficiary's interest. And there are circumstances under which a trustee may have compensation for valuable and permanent improvements made by him, under a bona fide claim of title, before he is apprised that his title is disputed: *Horton v. Sledge*, 29 Ala. 478, 499. Thus, if an officer of a railroad company buys land for it and pays therefor, but takes a conveyance thereof to himself individually, and then refuses to convey to the company, or to admit its right to the land, whereupon the company brings suit to obtain title to the land, and the defendant officer is willing to acknowledge that he holds the land in trust for the plaintiff, the trustee is entitled in equity to compensation for improvements made by him in good faith upon the land, which he is willing to convey to the company, if it chooses to take the improvements at their appraised value: *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. Rep. 216.

While a trustee having the possession, control, and management of property can make necessary repairs and incur other expen-

ditures requisite for the protection of the property, he cannot, unless authorized in the instrument creating the trust, make large and expensive improvements: *Herbert v. Herbert*, 57 How. Pr. 333; *Estate of Cole*, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402. A trustee who causes improvements to be made on the land of his ward by holding out the expectation of a lease, where no such lease can legally be made, is liable personally: *Findley v. Wilson*, 3 Litt. 390, 14 Am. Dec. 72.

Improvements on Property Sold for Taxes.—One holding in good faith under a tax deed, though it is void, has color of title, and, upon eviction, is entitled to compensation for permanent and valuable improvements placed by him upon the land: *Parker v. Vinson*, 11 S. Dak. 381, 77 N. W. 1023; *Croskery v. Busch*, 116 Mich. 288, 74 N. W. 404; *Page v. Davis*, 26 Neb. 670, 42 N. W. 875; *Zwietusch v. Watkins*, 61 Wis. 615, 21 N. W. 821; *Fish v. Blasser*, 146 Ind. 186, 45 N. E. 63; and see *Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572. Contra, *Allen v. Russell*, 59 Ohio St. 137, 52 N. E. 121. A person recovering land sold for taxes must pay the value of improvements placed thereon before he can obtain possession: *Knowles v. Martin*, 20 Colo. 893, 88 Pac. 467. He must, before he can recover land forfeited for taxes, pay for all improvements placed thereon in good faith, after the expiration of the period allowed for redemption: *McCann v. Smith*, 65 Ark. 305, 45 S. W. 1057. Under the statute of Arkansas, color of title is not a prerequisite to a recovery for improvements on land sold for taxes, nor is the legality of the tax a condition of recovery. The intent of the legislature was to encourage the purchase of lands sold for taxes, and to protect those making improvements on lands so purchased in good faith, by securing to them compensation for the same in the event they should, for any reason, fail to hold the land: *McCann v. Smith*, 65 Ark. 305, 45 S. W. 1057. If a grantor, however, remains in possession in subordination to the rights of the grantee, and during such time buys in an outstanding tax title, the mere recording of the tax deed is not such an independent, hostile title as will enable the grantor to recover for improvements made after obtaining the deed: *Paldi v. Paldi*, 84 Mich. 346, 47 N. W. 510. One who buys land at a tax sale is not entitled to an allowance for improvements made thereon after a proper tender made by one entitled to redeem: *Seger v. Spurlock*, 59 Ark. 147, 26 S. W. 819.

Improvements on Property Sold at Private Sale.—One who buys land under a parol contract is not entitled at law to any credit for improvements placed thereon by him, but such a purchaser may have compensation in equity for such improvements if the vendor refuses to convey: *Mathews v. Davis*, 6 Humph. 324; *Jordan v. Greensboro Furnace Co.*, 126 N. C. 143, 78 Am. St. Rep. 644. 35 S. E. 247; *Rhea v. Allison*, 3 Head, 176; *McCampbell v. McCampbell*,

5 Litt. 92, 15 Am. Dec. 48; *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 653; *Smith v. Administrators*, 4 Dutch. 208, 78 Am. Dec. 49; *Masson v. Swan*, 6 Helsk. 450; *Pass v. Brooks*, 125 N. C. 129, 84 S. E. 228. The party repudiating such a contract will not be allowed to enjoy the benefits of permanent improvements, put upon the land by one relying on the contract, without compensation for the additional value arising from such improvements: *Pitt v. Moore*, 99 N. C. 83, 6 Am. St. Rep. 85, 5 S. E. 389. But if a parol purchaser of land fails to keep his contract, and abandons possession, without the vendor's fault, he should not be allowed anything for improvements: *Rainer v. Huddleston*, 4 Helsk. 226.

A vendee of land, in possession, under a contract to purchase, is entitled to an allowance for permanent and valuable improvements placed by him in good faith upon the land, after deducting rents and profits, where the vendor repudiates the contract, or the title fails: *Richardson v. McKinson*, Litt. Sel. Cas. 320, 12 Am. Dec. 308; *Griffith v. Depew*, 3 A. K. Marsh. 177, 13 Am. Dec. 141; *Ewing v. Handley*, 4 Litt. 346, 14 Am. Dec. 140; *Craig v. Martin*, 3 J. J. Marsh. 50, 19 Am. Dec. 157; *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 408; *Gilbert v. Peteler*, 38 N. Y. 105, 97 Am. Dec. 785; *Lowry v. Cox*, 2 Dana, 469; and the vendee should not be compelled to surrender possession without payment for his improvements or security therefor: *Griffith v. Depew*, 3 A. K. Marsh. 177, 13 Am. Dec. 141. Compare *Bryan v. Lofftus*, 1 Rob. (Va.) 12, 39 Am. Dec. 242, showing the vendee's right to set off improvements against the rents and profits of the land, provided they do not exceed in value the amount of such rents and profits. A vendee in possession, disaffirming the contract and recovering damages for nonconveyance, is liable for rents, subject to the value of improvements placed by him on the land: *Craig v. Martin*, 3 J. J. Marsh. 50, 19 Am. Dec. 157. A vendee in possession under a contract for the purchase of land, suing for specific performance, may recover for improvements if he is free from fault, and specific performance fails by reason of some defect in the contract or noncompliance with the statute of frauds; but if he fails to maintain his right of action, not from any technical defect in the form of the contract, but on account of his own laches, negligence, and disregard of his obligations, he is not entitled to recover for improvements erected by him: *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 South. 756.

Compensation for improvements is allowed only to purchasers in good faith: *Thompson v. Kilcrease*, 14 La. Ann. 340; and cannot, therefore, be allowed to a purchaser who buys in violation of law, as where part of the consideration paid for the land consisted of intoxicating liquors, thus rendering the conveyance void as contrary to law: *Lindt v. Uihlein*, 109 Iowa, 591, 79 N. W. 73. Neither is a purchaser entitled to an allowance for improvements where

he bought with knowledge of a defect in title: *Walker v. Quigg*, 6 Watts, 87, 81 Am. Dec. 452; or want of title: *Citizens' Bank v. Costanera*, 62 Miss. 825; or where he bought from a mere trespasser, when slight inquiry would have disclosed the absence of title in the vendor: *Armstrong v. Oppenheimer*, 84 Tex. 365, 19 S. W. 520; or where he purchased from a lunatic: *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. So improvements made by a purchaser with notice of an equitable title cannot be made the subject of compensation where such purchaser is the complainant; but if the owner comes into equity for relief, he must do equity by making compensation for such improvements, for his gain and the defendant's loss by the improvements are the same as if they were made without notice: *Pugh v. Bell*, 2 T. B. Mon. 125, 15 Am. Dec. 142. And no allowance for improvements should be made to a vendee who obtained possession and title by fraudulent representations: *Mosely v. Miller*, 13 Bush, 498.

A vendee who buys conditionally is not entitled to credit for improvements: *McAbee v. Harrison*, 50 S. C. 39, 27 S. E. 539; and a vendee in possession who repudiates his contract or fails to comply with it is not entitled to any allowance for improvements made by him upon recovery of the premises by the vendor: *Seabury v. Doe*, 22 Ala. 207, 58 Am. Dec. 254; *French v. Seely*, 7 Watts, 231, 32 Am. Dec. 758; and see *Walker v. Arnold*, 71 Vt. 263, 44 Atl. 351. A purchaser entering into possession under a bond for a deed does not hold under color of title in good faith or adversely, and cannot, therefore, set off his improvements against use and occupation: *Seymour v. Cleveland*, 9 S. Dak. 94, 68 N. W. 171; *Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326. A vendee in possession cannot be allowed compensation for improvements made by his vendor: *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; nor unless he has color of title: *Kemp v. Cossart*, 47 Ark. 62, 14 S. W. 465. A person is not a bona fide purchaser for value where he merely takes a contract in writing for land, but pays nothing thereon and takes no deed. Hence, if he agrees in writing to sell the land to a lodge of Odd Fellows and puts the lodge in possession, which lodge makes lasting and valuable improvements thereon, such person cannot recover the value of such improvements made by the lodge upon its eviction, though he covenanted to protect the possession of the lodge, as such covenant does not make him a successor to the rights of the lodge in respect to the improvements: *Schetter v. Southern Or. Co.*, 19 Or. 192, 24 Pac. 25.

Improvements on Property of Husband or Wife.—Improvements put by a husband on his wife's land must be considered as a gift from him to her: *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278. Nor can a husband claim compensation from the wife's heirs for improvements put upon her land during coverture. The principle that it is against conscience for the owner to receive a substantial

benefit, created bona fide at the expense of another without remunerating him, does not apply, because the wife's legal existence is merged in that of the husband, and she could give no consent: *Marable v. Jordan*, 5 Humph. 417, 42 Am. Dec. 441. But good faith in keeping an agreement or understanding between husband and wife will require her to give him credit for improvements. Thus, a husband conveyed to his wife, in her own right, valuable premises which he had acquired by the joint labor and earnings of both since their marriage. He was induced to make the conveyance through the urgent solicitations of his wife, and her assurances that he should enjoy the premises with her as a home in the future as he had previously; and after the conveyance she urged him by similar assurances to make improvements on the land, which he did, at an expense to himself of at least four thousand dollars. After the completion of the improvements, and about three years and a half after the conveyance, during which time they had occupied the premises as formerly, the wife expelled the husband therefrom. In such case, the solicitations and assurances of the wife, and her subsequent expulsion of the husband from the premises, did not amount to such fraud as would justify a court of equity in setting aside the conveyance; but to urge him to make the improvements with the understanding that he was to enjoy them, and then deny him the right, without paying him therefor, was bad faith and fraudulent, and the expenses incurred by the husband in making the improvements should be paid to him by the wife, and the amount thereof be made a charge upon the premises in his favor: *Finlayson v. Finlayson*, 17 Or. 347, 11 Am. St. Rep. 836, 21 Pac. 57. A husband has no claim upon a building or its proceeds which he deliberately places upon the lands of his minor children by a former marriage, during the existence of the community: *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533. If a husband deeds his farm to his wife as security for the payment of money advanced by her to discharge a mortgage, but there is no agreement that she shall have a lien on the land for the amount of moneys expended by her in improvements on the farm, her heirs are not entitled to such a lien after the husband's payment of the mortgage debt: *Darling v. Darling*, 123 Mich. 807, 82 N. W. 48.

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REED v. PEACOCK.

[123 Mich. 244, 82 N. W. 53.]

JUSTICE'S COURT—PEREMPTORY CHALLENGE.—ONE OF THE REGULAR PANEL of jurors in a justice's court cannot be excused on a peremptory challenge.

TRIAL—CHALLENGE FOR CAUSE—ODD FELLOWS.—IT is no ground of challenge for cause where the plaintiff sues as assignee of an Odd Fellows' lodge, to which he belongs, that a juror is a member of the same order, but not of the same lodge.

TRIAL—JUSTICE'S COURT—EXCUSING JURORS.—IT IS ERROR for a justice of the peace to excuse a talesman for the reason that he is not a taxpayer if there is nothing to show that he does not possess the necessary qualifications of an elector.

R. A. Hawley, for the appellants.

F. C. Miller, for the appellee.

244 LONG, J. This action was commenced in justice's court to recover an alleged balance due on a certain lease entered into between the West Sebewa Lodge of Odd Fellows and defendants, which lease had been duly assigned by the **245** said lodge to the plaintiff. The defendants pleaded the general issue, and gave notice of recoupment. The plaintiff was a member of the West Sebewa Lodge of Odd Fellows. The defendants demanded a jury. Six jurors were selected for such jury in the usual way; that is, the officer wrote down the names of eighteen persons to serve as jurors, and each party struck off six. The six jurors remaining constituted the jury so struck. Two of the persons so selected were not found by the officer, and he summoned talesmen to fill their places. The jury thus present were sworn on their voir dire, and on examination it was ascertained that one of the original jurors, Lyman Shumway, and one of the talesmen, Carl Servos, were Odd Fellows; not, however, belonging to the West Sebewa Lodge, but belonging to the lodge in the city of Ionia. They were challenged by counsel for defendants for that cause, and the challenge held good by the justice. The plaintiff then exercised two peremptory challenges upon talesmen summoned by the officer, and the defendants also exercised two peremptory challenges upon talesmen summoned by the officer; after which other talesmen were summoned by the officer, and the plaintiff peremptorily challenged one more of them, but this challenge was denied on the ground that the plaintiff had exhausted his peremptory challenges. The cause was then tried by the jury,

three of whom were of those originally struck and three talesmen. The jury returned a verdict in favor of defendants. The plaintiff removed the cause to the circuit court by certiorari. The justice, in his return to the writ of certiorari, says that he excused Lyman Shumway from serving on the jury for the reason that he announced that he was an Odd Fellow; that he excused Carl Servos because he was also an Odd Fellow, and was not a taxpayer. The circuit court reversed the judgment of the justice, and the defendants bring the case to this court by writ of error.

It is well settled that one of the regular panel of jurors in justice's court cannot be excused on a peremptory challenge: *Eldridge v. Hubbell*, 119 Mich. 61, 77 N. W. 631. ²⁴⁶ The justice, however, returned that he excused both Shumway and Servos because they were Odd Fellows. It appeared that they did not belong to the same lodge of Odd Fellows that assigned the account to plaintiff. The fact of their being Odd Fellows did not disqualify them from sitting as jurors in the case. It was held in *Purple v. Horton*, 13 Wend. 9, 27 Am. Dec. 167, that it was no cause of challenge to a juror that he was a Free Mason, when one of the parties to a suit was a Free Mason and the other not. It was said by the court, in speaking of the rule which the defendant claimed would exclude such a person: "This rule would exclude every stockholder in the same bank, every member of the same church, and every associate of the same benevolent society."

In *Delaware Lodge No. 1, I. O. O. F., v. Allmon*, 1 Pennewill (Del.), 160, 39 Atl. 1098, it was held that in an action against a subordinate lodge of a beneficial society members thereof are disqualified as jurors, but that disqualification does not extend to members of other lodges. In *Barton v. Erickson*, 14 Neb. 164, 15 N. W. 206, it was held that a person who belongs to a religious denomination, as the Lutheran, is not thereby precluded from sitting as a juror in a case where a church organization of the same denomination, of which he is not a member, is a party.

The justice also returned that he excused Servos because he was not a taxpayer. Servos was called as a talesman, and it was error for the justice to excuse him for the reason that he was not a taxpayer. He was summoned as a talesman, and there was nothing to show that he did not possess the necessary qualifications of an elector: *People v. Wright*, 89 Mich. 70, 50 N. W. 792.

By the course taken by the justice the defendants were in effect given four challenges, against the objection of the plaintiff. The court below very properly reversed the judgment of the justice.

The judgment of the circuit court must be affirmed.

The other justices concurred.

JURORS—DISQUALIFICATION.—MASONS are not disqualified to act as jurors where a fellow-Mason is a party; and church members may act as jurors where other church members are parties: See the monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 757, 758, on the rejection of jurors for bias.

STATE BANK OF ELDORADO v. MAXSON.

[123 Mich. 250, 82 N. W. 31.]

JURISDICTION — ACTION BY ONE NONRESIDENT AGAINST ANOTHER—PROPERTY WITHIN THE STATE.—A circuit court has jurisdiction of an action by one nonresident against another, personally served with process, and in which the latter's real property within the county is attached, though the action is based on a contract foreign to the state, where the statute permits a creditor to proceed by attachment against his nonresident debtor in the circuit court of any county in which property of the latter may be found.

HUSBAND AND WIFE—LIABILITY OF SEPARATE ESTATE OF WIFE ON HER CONTRACTS—LAW OF KANSAS.—The separate estate of a married woman is, under the statute of Kansas, answerable in an appropriate action at law for the payment of her promissory note, though its only consideration was a credit extended to her husband.

CONTRACTS OF MARRIED WOMEN—ENFORCEMENT OF—CONFLICT OF LAWS.—Under a contract made in Michigan, a wife's property is not liable for her husband's debt, unless the contract specifically binds such property by express written agreement of the wife; but under the statute of Kansas a wife's property is liable upon her contracts. Hence, if a married woman, a resident of Kansas, is indebted in that state upon a note signed by her for the benefit of her husband, and has property in Michigan, the Kansas creditor may enforce payment of the debt in Michigan by an attachment of her property in the latter state.

Assumpsit by Kansas bank against L. I. Maxson, impleaded with A. C. Maxson and others, upon a promissory note. The plaintiff obtained judgment and the defendant brought error.

Grant Fellows and Bert D. Chandler, for the appellant.

Frankhauser & Cornell and F. A. Lyon, for the appellee.

²⁵¹ LONG, J. The parties to this cause all reside in the state of Kansas. The action was commenced in this state by writ of attachment. The property attached consisted of the undivided half interest of defendant Isabella Maxson in a certain eighty acres of land in Hillsdale county. The writ was served personally on her. The other defendants were not served with process. The action is upon a certain promissory note reading as follows:

"\$2,000.

Eldorado, Kansas, Oct. 7, 1897.

"Thirty days after date, for value received, we promise to pay to the order of the State Bank of Eldorado, Kansas, two thousand dollars, with interest from maturity until paid at ten per cent per annum; interest payable annually, and, if not paid annually, each installment thereof, when due, shall be added to and become a part of the principal, and thenceforth draw the same rate of interest. Each of the several makers and indorsers hereon hereby expressly ²⁵² agrees that the holder of this note may, at the instance of any maker hereof, and without notice to any other maker or indorser, make a valid agreement to extend the time of payment of this note, or any part thereof, for any period or periods not exceeding one year from maturity, said makers and indorsers hereby consenting to and approving of the same, and expressly waiving any defense by reason thereof. The indorsers hereon expressly waive protest and notice of protest of this note.

"A. C. MAXSON, Jr.

"MAUDE MAXSON.

"A. C. MAXSON.

"L. I. MAXSON."

It was shown on the trial that the defendant Isabella Maxson (L. I. Maxson) signed the note with her husband, A. C. Maxson; that it was not given for her debt, but solely for a debt of the husband; that none of the money received was used in and about her separate estate, and was in no wise for her benefit. The lands sought to be reached by these proceedings came to her by descent under the laws of this state. She was a married woman at the time she signed the note in controversy.

The married woman's act of the state of Kansas and several Kansas decisions were put in evidence by the defendant. The court below held, and so directed the jury, that the defendant Isabella Maxson was liable on the note, unless they found that the note had been paid. He further instructed them that: "This note is a Kansas contract, and is governed by the laws

of the state of Kansas. Under the laws of the state of Kansas this defendant is bound by her signature to her husband's note in the same way that she would be if she were unmarried. If you find that she signed this note, she signed it as a joint maker, and is, therefore, equally bound with her husband, and her property is liable for its payment in the same way as that of her husband. You are, therefore, instructed that you cannot consider the question of the marriage relations between these parties; and I charge you that she is bound to pay this note, unless you find the same has been paid."

²⁵³ It is of this part of the charge that counsel for the defendant complain. They contend: 1. That the court had no jurisdiction of the controversy; 2. That a common-law action could not be maintained; 3. That, under a proper construction of the married woman's act of Kansas, the defendant's property could not be held for a debt for which her husband was primarily liable.

Our statute provides that: "Any creditor shall be entitled to proceed by attachment against his debtor, . . . in case the debtor . . . is a nonresident, . . . in the circuit court of any county where the property of the debtor subject to attachment may be found": 3 Comp. Laws 1897, sec. 10,555.

In *Newland v. Wayne Circuit Judge*, 85 Mich. 151, 48 N. W. 544, the precise question was before this court, and it was held that where a nonresident comes into this state and submits himself to the jurisdiction of the court, the statute points out the mode of procedure to acquire jurisdiction over the defendant: See, also, *Cofrode v. Wayne Circuit Judge*, 79 Mich. 343, 44 N. W. 623. We think the court below was not in error in holding that it had jurisdiction of the parties and subject matter of the controversy.

The second point made by counsel is that the suit should have been in equity, and not at law. Counsel rely upon the case of *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480. Counsel say of that case: "It will be seen that the court in deciding it bases its decision absolutely and solely upon the equity powers of the court, and as squarely holds that a common-law action will not lie, and grants to the plaintiff equity relief. It does so because it holds that when a married woman signs a note in equity she thereby charges her separate estate, and she is estopped from claiming otherwise, and, exercising its equity powers, the court holds her to be liable upon her signature. . . . Kansas holds that when she signs her name to a note

she thereby (in equity) pledges all her property, and the equity power of the court will enforce the pledge."

²⁵⁴ We think counsel are in error in supposing that the Kansas case above mentioned holds that a common-law action will not lie upon this kind of a contract. The contract was made in Kansas, and must be controlled by the law of that state. It was held in the case referred to that a married woman can bind herself for the payment of her husband's debt by signing a promissory note, the only consideration for which was the credit given the husband. Construing section 2 of the married woman's act of that state, the court says: "A married woman may, under said section 2 of the married woman's act, contract in the same manner, to the same extent, and with like effect, with reference to her property, as a married man."

In *Miner v. Pearson*, 16 Kan. 28, it was said: "A married woman may, in this state, bind herself by her contracts to the extent of her separate property; and a personal judgment may be rendered against her, which will reach any or all of her separate property not exempt from execution under the exemption laws."

In *Wicks v. Mitchell*, 9 Kan. 80, in a suit on a promissory note given by a married woman in satisfaction of her husband's debt, it was held that an allegation that "she has not charged her separate property with the payment thereof, but at the time of its execution refused in any manner so to charge her separate property," presented no defense; that the law presumes that, by executing such note, a married woman intends to bind all her property, and she will not be permitted to deny such effect, nor to avoid the instrument by declaring at the time of its execution that she will not do what she is actually doing.

Counsel, however, contend that under section 17 of the married woman's act of Kansas it must be held that the defendant is protected under the laws of this state. That section provides: "Any woman who shall have been married out of this state shall, if her husband afterward becomes a resident of this state, enjoy all the rights as to property which she ²⁵⁵ may have acquired by the laws of any other state, territory, or country, or which she may have acquired by virtue of any marriage contract or settlement made out of this state": 2 Gen. Stats. 1897, c. 123, sec. 17.

Counsel's contention is that, under this statute, "if a woman acquires property under the laws of this state, when it is assailed in the courts of this state she is entitled to the protec-

tion of the laws of this state, and that under the laws of this state it could not be taken for the husband's debt." It is true that, under a contract made in this state, the wife's property cannot be taken for the husband's debt unless the wife expressly agrees in writing that it may be so taken; that is, unless the contract binds her separate property specifically. The Kansas statute above quoted gives the wife the right to the enjoyment of all her property, but as held in *Deering v. Boyle*, 8 Kan. 525, 12 Am. Rep. 480, her property is subject to seizure and sale upon contract made by her the same as the husband's property is liable.

We think the court below was not in error in the charge given, nor in the construction he gave to the Kansas cases. The judgment must be affirmed.

The other justices concurred.

JURISDICTION — NONRESIDENTS — PROPERTY WITHIN THE STATE—PERSONAL SERVICE.—If a nonresident is within the state, personal service of process upon him confers jurisdiction over his person: *Alley v. Caspari*, 80 Me. 234, 6 Am. St. Rep. 178, 14 Atl. 12; and the state has jurisdiction over all property within its borders: See extended notes to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 181; *Alley v. Caspari*, 6 Am. St. Rep. 181.

CONTRACTS OF MARRIED WOMEN—ENFORCEMENT OF—CONFLICT OF LAWS.—If the statute of one state empowers a married woman to sign a note as surety for her husband's debt, such a contract will be enforced against her in another state, where it is not considered to be in conflict with the general interest of the citizens of the latter state or its public policy. If the laws of another state authorize her to bind herself by a note, and she makes such a contract there, it will be enforced here, although she could not so obligate herself in this state. And if she makes a note as surety for her husband in another state, where she resides, the contract can be enforced against her land in this state, although the note would be void by the laws of this state, if the wife contracted with reference to the land here, and intended to charge it with the debt: See the monographic note to *Ruhe v. Buck*, 46 Am. St. Rep. 448, 455, discussing the enforcement of obligations of married women outside of the state where made.

FULTON v. PRIDDY.

[123 Mich. 298, 82 N. W. 65.]

DEEDS—ESCROW—VALIDITY.—A deed placed in escrow beyond the control of the grantor, to be delivered to the grantee upon the grantor's death, is valid.

DEEDS—ESCROW.—THE CONDITION upon which a deed placed in escrow is to be delivered need not be in writing, but may rest in parol, or partly in writing and partly in parol.

DEEDS — ESCROW — ALTERATION — REDELIVERY — WITNESSES AND ACKNOWLEDGMENT.—A deed not witnessed is good between the parties, notwithstanding a statute which requires deeds to have witnesses and to be acknowledged. Hence, if a deed placed in escrow, to be delivered to the grantee upon the grantor's death, contains a clause making it subject to the grantor's recall, but the grantor afterward alters the deed by erasing such clause, and again places it in escrow, the instrument is valid and effectual to pass title, though, as changed, it is not witnessed or acknowledged.

Ejectment. There was a judgment for the plaintiffs and defendant brought error.

John E. Bird and Salsbury & O'Mealey, for the appellant.

Watts, Bean & Smith, for the appellees.

208 MONTGOMERY, C. J. This is an action of ejectment. Both parties claim under alleged conveyances from Rhoda ²⁰⁹ Reed, wife of Samuel B. Reed. Plaintiffs claim under a deed made by Rhoda Reed, executed on the twenty-fifth day of September, 1889, and delivered to Henry C. Smith in escrow, to be delivered to the plaintiffs at the death of the grantor. The defendant claims under a deed alleged to have been made to Samuel B. Reed between the years 1877 and 1879, and subsequently lost without being recorded. The jury found that this last-mentioned deed never existed, so that the case turns upon the questions of whether there was error in the course of the trial which affected the determination of that question of fact, and whether the plaintiffs show a valid conveyance.

As the plaintiffs must recover on the strength of their own title, the first question in order is whether a valid conveyance is shown. The deed under which plaintiffs claimed title had inserted in its body when first executed a clause reading as follows: "This deed is delivered to Henry C. Smith, of the city of Adrian, by the above-named grantor, in escrow, to be by him delivered to the above-named grantees at the death of the grantor, or to the grantor in her lifetime, if she requests."

It is conceded by plaintiffs that the deed as at first written was inoperative, as it was subject to recall at any time by the grantor. It appeared, however, that after the first execution and delivery of the deed to Mr. Smith, his attention was called to the decisions which established the invalidity of the deed in its then form, and that he sent for the grantor, and so stated. What occurred subsequently is stated by Mr. Smith as follows: "In response to this message, Mrs. Reed came into the office, and I explained it to her what my fear was regarding that clause in the deed, and she said that it did not matter anyhow; she did not want it back, and would not; that Mr. Reed had importuned her to make a conveyance to him, but she did not want to do it, and she preferred to have it beyond her control; and she asked me to erase that clause, and I did so. I took a rubber and erased it, and she handed it back to me, and I put it in among my private ³⁰⁰ papers, in a drawer in our safe. She told me to give it to Mr. and Mrs. Fulton, to deliver it to them upon learning of her death, and put it upon record, and enjoined me again to keep it secret. After I learned of her death I sent for Mr. Fulton, or he called—I have forgotten which. I think he called, and claimed that he had been informed by her that there was such a deed—he and his wife had—and at his request I took it down here, and had it put on record."

After the erasure, the deed read as follows: "This deed is delivered to Henry C. Smith, of the city of Adrian, by the above-named grantor, in escrow, to be by him delivered to the above-named grantees at the death of the grantor."

From the deed, as supplemented by the testimony of Mr. Smith, it appears that it was delivered intending it to be placed beyond recall by the grantor. That a conveyance so made is valid and effectual to convey title, see *Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154; *Wallace v. Harris*, 32 Mich. 380; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426.

The condition upon which the deed is to be delivered need not be in writing, but may rest in parol, or partly in writing and partly in parol: 11 Am. & Eng. Ency. of Law, 2d ed., 343; *Stanton v. Miller*, 58 N. Y. 203.

But it is said the deed was not re-executed, and was not, as changed, witnessed or acknowledged. According to the testimony of Mr. Smith, however, the change was made in the presence of the grantor, by her direction, and the deed was again delivered to him. The delivery of the deed may always

be shown by parol testimony. If it was competent, therefore, for the grantor to pass title to this land by a deed without witnesses, it would seem to follow that the redelivery of the deed to Mr. Smith after the erasure would be effectual: 2 Am. & Eng. Ency. of Law, 2d ed., 217.

It is strenuously insisted that under our statutes (3 Comp. Laws 1897, sec. 8962) witnesses are necessary. It is hardly profitable to discuss the question of whether ³⁰¹ the statute might be open to this construction, as this court in an early day dealt with the question, and in so doing established a rule of property which we would not, under any view, feel at liberty to depart from. Under the holdings referred to a deed not witnessed is good between the parties: *Dougherty v. Randall*, 3 Mich. 581; *Price v. Haynes*, 37 Mich. 487; *Baker v. Clark*, 52 Mich. 22, 17 N. W. 225.

As to the deed to Samuel B. Reed, was the question of fact fairly submitted on competent testimony? We think the charge was fair and full, and we also think the rulings of the court were proper on every question raised on the introduction of testimony.

Complaint is made of an alleged attempt to draw one Warren Gilbert into the case. It appears by defendant's own testimony that Mr. Gilbert had charge of securing witnesses on the former trial for Mr. Reed. The inquiry as to what he did in that connection was proper within reasonable limits, and the court appears to have kept within the limit.

The judgment is affirmed.

The other justices concurred.

DEEDS—DELIVERY AFTER DEATH.—If a grantor executes a deed and places it in the hands of a third party, to be held and delivered to the grantee after the grantor's death, reserving to himself no control over nor right to recall or revoke it, these facts constitute a valid delivery: *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215, 45 N. E. 1021.

A DEED IS VALID BETWEEN THE PARTIES without attestation or acknowledgment: *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62. Acknowledgment is only necessary to entitle the deed to record: *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330, 22 N. E. 414.

BELL v. WAYNE.

[123 Mich. 386, 82 N. W. 215.]

MUNICIPAL CORPORATIONS—LIABILITY—BARRIERS ON HIGHWAY.—If a highway, within the limits of a municipality, is in good condition and wide enough to drive upon with safety, and a horse, while being driven thereon, leaves the highway through any cause for which the municipality is not answerable, and an accident occurs, resulting in injury to the driver, the municipality is not liable therefor on the ground that it failed to maintain barriers at the place of the accident.

MUNICIPAL CORPORATIONS—LIABILITY—ACCIDENTS ON HIGHWAY—HORSES BEYOND CONTROL—PROXIMATE CAUSE.—If a horse, while being driven on a highway, within the limits of a municipality, becomes so frightened at some boys in a plum tree near the highway and near the approach of a bridge thereon that, under proper management, he cannot be kept within a good roadbed, seventeen feet wide, he is "beyond control," and if an accident occurs resulting in injury to the driver, the municipality is not answerable therefor, as the fright and not the absence of barriers was, as a matter of law, the cause of the accident.

Action for personal injuries, sustained upon a highway within the corporate limits of the defendant village. The highway crossed a river, over which there was a bridge, the approach to which was elevated between eight and nine feet. On one side of the elevation the descent was perpendicular; on the other it was sloping. There was no barrier on either side of the approach. While on the elevation the plaintiff's horse caught sight of some boys in a plum tree near by and started back. The horse was attached to a buckboard. The wheels became cramped so that, if the horse continued to back, the plaintiff would have been thrown out backward, down the abrupt descent. To save himself, he struck the horse a blow with his whip, and the animal slowly started forward, but the earth giving way, he slipped down the other side of the approach and injured his driver. The court directed a verdict for the defendant and the plaintiff brought error.

Selling & Hatch, for the appellant.

Cutcheon & Stellwagen, for the appellee.

³⁸⁷ **GRANT, J.** The distinction now contended for in cases of this character was not lost sight of by the writer of the opinion in *Doak v. Saginaw*, 119 Mich. 680, 78 N. W. 883. The differences between that case and this are these: In this case the banks were higher and steeper, at least on one side.

In the Doak case the frightened horse backed into the ditch. In the present case the backing horse was struck by the plaintiff, started forward, crossed the road, and went down the embankment. The roadbed in this case was wider than that. Here the roadbed was seventeen feet wide and in good condition. In both cases the horses were frightened, and not by anything for which the township was at fault. In the Doak case it was uncertain what frightened the horse and caused him to back. In the present case it was two boys in a tree. The plaintiff lost control of his horse, so that he was unable to keep him within the traveled way, seventeen feet wide. He testified that there would have been no trouble if the horse had not seen the boys in the tree.

Whether this is a case where barriers should have been erected I do not deem it necessary to determine. In Massachusetts the statute expressly makes townships liable for the failure to erect barriers. What the decisions would be if their statute were like ours is, at least, doubtful. In *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166, the stone wall which formed the barrier was two feet high. On the outside of the wall was water ten feet deep, the surface of which was about eight feet below the top of the wall. The horse became frightened at some oyster boats, and ran into or upon the wall, and got astride of it with his hind legs. That case is in direct conflict with *Beall v. Athens*, 81 Mich. 536, ~~388~~ 45 N. W. 1014. It is impossible to reconcile them. In *Harris v. Great Barrington*, 169 Mass. 271, 47 N. E. 881, it was held that the roadbed, seventeen feet wide, was not defective by reason of narrowness, but that there was evidence that the highway was defective for want of a sufficient railing.

If, as my brother Montgomery says, the rule has not been made entirely clear by the decisions, it undoubtedly results from the difficulty in determining when the driver has, and when he has not, lost control of his frightened horse. In the Doak case the horse had become so unmanageable that the driver could not prevent his backing. Doak's counsel said in their brief: "The driver did his utmost to prevent the backing." In the present case the frightened horse was backing, was struck by the driver, and had become so unmanageable that he could not keep him within the limits of the traveled road, wide enough for two teams to pass with perfect safety. Plaintiff did his utmost to keep the horse in the road, but failed to do so. We held in *St. Clair Mineral Springs Co. v. St. Clair*, 96

Mich. 463, 56 N. W. 18, that where a horse stopped, backed over the apron of a bridge against an insufficient railing, fell into the water, and was drowned, the city was not liable. In that case there was no fright. The horse started up the bank, and backed because of too great a load. Under the contention of the plaintiff in this case, if the horse, instead of backing from an overload, had backed from fright, and the jury could find that the driver had lost only temporary control, the city would have been liable. In neither case was the city or village responsible for the proximate cause of the accident. What difference, in principle, between the two cases? Is it logical to say that, where the horse backs from other cause than fright, the defendant is not liable, but where he backs from fright it is liable, provided the jury are able to find that the driver had not lost complete control of him? There certainly is no difference in the liability between backing and shying or running down an embankment or into a ditch.

~~380~~ In *Beall v. Athens*, 81 Mich. 536, 45 N. W. 1014, the horse became frightened at a log upon the side of the highway. The driver struck his horse, which jumped forward, and upset the buggy. In this case the horse became frightened, was struck, could not be kept within the highway, and went down the embankment. Where is the difference in principle or in the facts between that case and the present? Both horses went over the side of the road because their drivers were unable to keep them within the traveled way.

In *Lambeck v. Grand Rapids etc. R. R. Co.*, 106 Mich. 512, 64 N. W. 479, plaintiff's horse had run for a block, and ran into the end of a car standing in the highway. Plaintiff was unable to keep him from running the carriage against it. It was held that the horse was beyond control.

In *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383, 21 N. W. 873, it was claimed that the horse was frightened at a large stone standing in the highway between the roadbed and the gutter, turned up a side street, and upset the buggy. It was there said: "If the stone had anything to do with the action of the horse and damage to the buggy, it was by frightening the animal, and not by hurting or impeding him." If the horse in that case had shied or run into the gutter, or, running down the side of the roadbed, had caused the buggy to sway and upset, would not the rule of law have been the same?

In *Bleil v. Detroit etc. Ry. Co.*, 98 Mich. 228, 57 N. W. 117, the horse was hitched, broke away, and ran into iron rails piled

upon the street. If the driver had been in the buggy when the window fell, and the horse had started and run upon the rails, causing the same injury, would this court have said that the rails, and not the falling of the window, were the proximate cause of the injury, if the jury were enabled to find that the horse was not beyond control?

What is the principle or rule upon which these decisions are based? It is that the primary cause of the accident is the fright of the horse, not the defect in the highway. Why should a jury be left to speculate upon the question ³⁹⁰ whether the driver could have controlled his horse but for the defect in the highway? In *Langworthy v. Green*, 95 Mich. 93, 54 N. W. 697, the wagon struck a log, which was from four to eighteen inches above the roadbed, and near the center thereof. The horses had not left the traveled road, but had for some reason which did not appear shied a little to one side. It did not appear that the horses were running or were going at an unsafe speed for a properly constructed roadbed. By referring to the same case in 88 Mich. 207, 50 N. W. 130, it will be seen that the plaintiff was driving at a slow trot when the log was struck.

We are not concerned with the rule in other courts if this court has established a rule and followed it. In the cases above cited I think we have established and recognized the rule to be that a township is not liable, under our statute, for the failure to maintain barriers, where the horse leaves a traveled highway, which is in good condition and wide enough to drive upon with safety, through any cause for which the township is not responsible. When a horse has become so frightened that, under proper management, he cannot be kept within a good roadbed seventeen feet wide, he is beyond control, under our decisions, and the fright, not the absence of barriers, is the cause of the accident. Upon no other rule can these decisions, in my opinion, be sustained.

I think the learned circuit judge was correct in directing a verdict for the defendant. Its reversal would, in my judgment, result in overruling the cases above cited and approved in *Doak v. Saginaw*, 119 Mich. 680, 78 N. W. 883.

The judgment should be affirmed.

Long, J., concurred with Grant, J.

HOOKER, J., concurring. The doctrine that a township is not liable for an injury where, though negligent, such negligence is not the proximate cause of the injury, has been as-

serted and reiterated many times by this court. Like other rules, it is invoked in many cases where its ³⁹¹ application is of doubtful propriety, and doubtless in some to which it should not be applied. It is not unnatural that minds should differ in close cases, and there is always danger that a misapplication shall make it more difficult to adhere to the rule and easy to extend it. There is but one proper way to deal with such questions, and that is to adhere to the underlying principle, and not put too great emphasis upon similar, but not necessarily analogous, decisions. If this is done in this case, I am of the opinion that its proper solution need not be difficult. It has been several times held that where a horse while running away strikes an obstruction, the resulting injury is due to the running away, and not to the obstruction, because the former, and not the latter, is the proximate or moving cause of the injury. The law requires highways to be kept in condition for the ordinary uses, and it expects the driver to be in control of his horse, and does not assume to compensate those who are injured through a failure to maintain such control. The decisions do not refuse relief upon the ground that the horse was running away, but upon the ground that the uncontrolled impulse of the horse was the moving—i. e., proximate—cause. Where the loss of control is due to the negligence of the town, it has been held that the township is liable, but where it is due to other causes, the contrary has been usually held.

We are cited to cases which hold that the mere shying of a horse is not sufficient to exonerate a township, the reason being given that shying is to be expected of a horse, and that control cannot be said to be lost if the horse is so far under the control of the driver as to be immediately stopped or brought back to the traveled way. It makes little difference whether we say that the horse was under control of the driver when he shied, or that the want of control was but momentary and to be expected at times with any horse from his common and known habit, and therefore an exception to the rule. In neither is ground for breaking down the rule. The case can, at most, be treated as an exception, and though a precedent ³⁹² governing cases where a horse shies suddenly a little out of the beaten track, it does not follow that the exception should cover all cases where the want of control is of short duration, or where caused from some vice or habit which cannot be said to be found in horses in general. A horse which, through fright at an object on one side of the road, leaves the traveled way, and notwithstanding

the utmost efforts of the driver cannot be made to return to it, and ultimately crosses the highway ditch, or goes to the verge of an embankment, which slides down with him, has done something more than to merely shy. To "shy" is defined as "to start suddenly aside as if a little frightened." So if the horse should rear and fall against the carriage, throwing all down an embankment, or if he should refuse to obey the driver to go forward, and back up instead, overturning the buggy against a tree in the highway, or going down an embankment, the horse is beyond control as much as though running away, and, to my mind, much more than when merely or momentarily starting and shying.

If these instances are enlargements of the adjudicated instances of shying, they are not within the exception, and if one after another they are included within the exception, the rule will soon give way under the evolution of the exception. It is as much the duty of the citizen to drive reasonably tractable horses as it is of the community to maintain reasonably safe highways, and as much the duty of courts to hold the former to the consequences of a failure of the performance of his duty as the latter; and it is, to say the least, fairly debatable whether the doctrine of proximate cause is not a reasonable and just one. It is not yet the law that the highways must be so level and smooth that a horse cannot capsize a carriage, and provided with barriers so strong that a team cannot break them down, to the injury of the driver. Barriers may be required in some cases, as where the highway and its surroundings are of such a character as of themselves to create the danger of fright; but we may take judicial ³⁰⁸ notice that barriers are usually limited to such places, and are not common along our highway ditches or causeways. The case of Doak was correctly decided, in my opinion. The present case is substantially on all fours with *Beall v. Athens*, 81 Mich. 536, 45 N. W. 1014. The other cases are not cited, because referred to in the opinions of my brethren.

I think the judgment should be affirmed.

MONTGOMERY, C. J., DISSENTED. The circuit judge considered that the presence of the boy in the plum tree and the consequent fright of the horse was the proximate cause of the injury to the plaintiff, and directed a verdict for the defendant, but the learned chief justice was of the opinion that the plaintiff was entitled to go to the jury. "The evidence," he said, "showed that the horse was not running away; that, at the most, he took but three or four steps back, and that plaintiff did not lose control of the

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horse; and that the horse had his own way but momentarily, at the most." The chief justice commented upon the illogical way in which the courts have dealt with the rule in this class of cases, citing Cooley on Torts, pages 70, 76, 77, 622, by way of illustration, and approved the rule and distinction laid down in Wharton on Negligence, section 103. "That writer," he said, "reaches the conclusion that where a township is negligent in failing to keep its highway in repair, and an injury results from a frightened horse striking against a defect in the way from which, if he had not been frightened, he could have been safely guided by his driver, the municipality is not liable to an action." He adds, however: "This mode of reasoning is inapplicable if the evidence is that the horse, being driven with due care, simply shies to an extent common and probable among horses, and when shying he deflects a few feet from the beaten track, and then strikes against the defect. In this case, as such shying is part of the natural and probable habits of horses, and does not, when only producing a slight change of course, make the horse unfit for use in a public road, the road-making authorities are liable for the consequences": See, also, Wharton on Negligence, sec. 963. "There are many cases," said the chief justice, "which, as pointed out in Langworthy v. Green, 95 Mich. 93, 54 N. W. 697, hold to a still stricter rule of liability, and maintain that the fact that the horse is frightened and at the time uncontrollable does not relieve the municipality of liability": but he found that the rule quoted from the text of Wharton on Negligence is "abundantly supported in those jurisdictions in which the stricter rule above adverted to does not prevail."

"The case of Wright v. Templeton, 132 Mass. 49," said the justice, "is very similar in its facts to the present. The plaintiff's horse was frightened by the lantern of some boys fishing. The horse backed up, cramped the wagon, and carried it against the railing, which gave way. Defendants preferred a request that, if the horse backed a distance of twenty or thirty feet, the plaintiff could not recover. The court held that this request was properly refused. It was held, in effect, in Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166, that the township might be liable if they did not lose control of the horse or lost control for a moment only, and either regained control or would have regained it but for a defect in the way: See, also, Harris v. Great Barrington, 169 Mass. 271, 47 N. E. 881. The case of Olson v. Chippewa Falls, 71 Wis. 558, 37 N. W. 575, is quite similar in its facts to the present. It was said: 'The team instantly and suddenly became frightened by some suddenly appearing object, . . . and as instantly and suddenly backed. . . . Such a movement of any team would not be at all uncommon under such circumstances, and so the city might have anticipated when it left the steep bank of the creek so unguarded in such a place.' The distinction contended for in the present case was again noted by this court in Gage v. Pontiac etc.

R. R. Co., 105 Mich. 335, 63 N. W. 318, and recognized in *Simons v. Casco*, 105 Mich. 588, 63 N. W. 500, but was clearly lost sight of in *Doak v. Saginaw*, 119 Mich. 680, 78 N. W. 883. In the last case a motion for a rehearing should be granted." The chief justice was, therefore, of the opinion that the judgment should be reversed and a new trial ordered, and Moore, J., concurred with him.

MUNICIPAL CORPORATIONS — LIABILITY — DEFECTS IN HIGHWAY—FRIGHTENED HORSES.—A defect in a highway, for which a town is liable, must be such that it is the sole cause of the injury complained of. Where the proximate cause of an injury on a highway is the fright of a horse, and that fright is not caused by any defect in the highway, nor by any neglect of duty on the part of the township officers, the township is not liable, although the injury is caused by the horse running into a defect in the highway: See the note to *Cleveland v. Bangor*, 47 Am. St. Rep. 336.

PEOPLE v. SLAYTON.

[123 Mich. 397, 82 N. W. 205.]

APPEAL—SUFFICIENCY OF EVIDENCE WILL NOT BE CONSIDERED, WHEN.—An assignment of error relating to the sufficiency of evidence cannot be considered if the bill of exceptions embraces only a part of the testimony, although the trial judge's certificate states that all of it has been returned.

LARCENY—ADVICE OF COUNSEL AS A DEFENSE.—In a prosecution for larceny, where the defendant claims that he took the property under the advice of counsel, believing it to belong to another person than the complaining witness, it is not necessary that the advice of counsel, to be available as a defense, should have been given upon a statement of "all the facts" known to the defendant. The advice of counsel has no significance, in such a prosecution, except as a circumstance bearing on the defendant's good faith.

Dodge & Covell, for the appellant.

D. G. F. Warner, prosecuting attorney, for the people.

338 MOORE, J. The respondent, who was convicted of the larceny of a horse, has brought the case here upon writ of error. We cannot well consider some of the assignments of error, for the reason that all the testimony in the case is not returned. The certificate of the trial judge states it is all returned, while the record discloses very clearly that as to some of the important witnesses none of the testimony in chief is returned, and only a part of the cross-examination.

It appears from the record that the respondent went to the barn of the complaining witness in the night-time, when the complaining witness was away from home and his family was in bed, and took away a horse, which the complaining witness claimed to own. He delivered the horse to one Hoxie, who took it out of the county, and the complaining witness never saw it afterward. It was claimed on the part of the respondent he was acting for a firm who had sold the horse to the complaining witness, taking a note therefor, in which they reserved the title to the horse; that he had the note with him at the time he took the horse, and posted a copy of it upon the barn; and that he acted in good faith. He also claims he acted under the advice of counsel. It is claimed upon the part of the people that the note given by complaining witness did not reserve the title to the horse, and that if such a clause appeared in it, it was inserted after he gave the note, and was a forgery, and that respondent knew before he took the horse of this claim of the complaining witness. It is also claimed that respondent did not fully and fairly state all of the facts to the counsel he consulted, and was not advised by him to take the property in the night-time and run it out of the county.

It is contended on the part of the respondent that where one in good faith takes another's property under a claim of right so to do, he is exempt from the charge of larceny, however puerile or mistaken the claim in fact may be: Citing *People v. Hillhouse*, 80 Mich. 580, 45 N. W. 484. ³²² Upon that feature of the case the trial judge instructed the jury:

"If the respondent took the horse in question under the note produced in this case, and in so doing was acting for A. Kahn, and in the belief that said A. Kahn owned said horse, then said respondent would have a right to do what he did, and your verdict must be not guilty. Even if the jury should find that said note had been fraudulently changed, that fact itself would not render the respondent guilty of larceny in taking said horse. . . .

"An officer or agent who takes possession of property under a chattel mortgage or note to enforce the collection of a debt would not be guilty of larceny if it should afterward appear that said chattel mortgage or conditional note was forged or fraudulently changed by some other person unknown to the respondent. So in this case the respondent cannot be found guilty on the mere fact that the note has been fraudulently changed, if you find it has been changed; still you must acquit

the respondent, unless you find that he feloniously took said horse with the intent and for the purpose of stealing him and depriving the owner of his property. If the respondent took said horse on the claim of ownership in A. Kahn, and to enforce the claim of A. Kahn against said horse, even though said respondent was mistaken as to the genuineness of said note—that is to say, if he believed in the genuineness of the note—still he would not be guilty of larceny, and your verdict should be not guilty in such case.

“There can be no crime without criminal intent, and crime cannot be inferred from secretly or clandestinely taking property—taking possession of property on claim to own, or of property claimed to be owned by another, by whom the party is employed to act in taking the same; but such fact and circumstances may be taken into consideration by the jury in aiding them to come to a conclusion of the bona fides of the taking of the property. By ‘bona fides’ I mean the good faith of the taking, whether with a felonious intent or a criminal intent.

“The wrongful taking of the property would not make it larceny, nor would the taking of this property, after knowing it was in dispute, or that it was claimed that there had been a forgery committed, make it larceny; but, in addition to this, there must have been a criminal intent, or a taking and carrying away with a felonious intent, ⁴⁰⁰ beyond a reasonable doubt, or your verdict must be not guilty.”

This charge was repeated, in effect, several times over, and was all that respondent had a right to claim upon that branch of the case.

It is said that, as respondent was acting under the advice of counsel, this disproved the necessary criminal intent to constitute larceny: Citing *People v. Schultz*, 71 Mich. 315, 38 N. W. 868. The jury were instructed as follows: “If you find the respondent, Mr. Slayton, was acting under the advice of an attorney in this case—that he followed the advice and instructions of such attorney—this would do away with the necessary criminal intent, and you will find the respondent not guilty. In order for that to be an excuse for the respondent, however, he must act strictly under the advice of counsel, and he must in good faith believe that the advice—that is, he must submit to counsel all the facts known to him, and then act under such advice in good faith. A person may not, who was intending to commit a wrong, tell part of the facts and circumstances to counsel, and then act under advice of counsel. It is necessary

that he must act in good faith, even when acting on the advice of counsel; but a person may rely upon counsel, if he states to the counsel all of the facts and circumstances."

In our opinion, the advice of counsel has no significance in this case, except as a circumstance bearing upon the respondent's good faith. The question was introduced by his counsel by their nineteenth request to charge, which was as follows: "Gentlemen of the jury, if you find that the respondent, Mr. Slayton, was acting under the advice of an attorney in this case—that he followed the advice and instructions of such attorney—this would do away with the necessary criminal intent, and you will find the respondent not guilty."

This request was not, and should not, have been given, but that does not justify the instruction given. In a case of malicious prosecution, the instruction given would perhaps ⁴⁰¹ have been proper; but in a criminal case like this, there is no such limitation upon the defense of good faith as that advice of counsel may not be relied upon unless all facts are stated to counsel. We are of the opinion that the language of the charge in this particular was injurious.

It is assigned as error that the trial judge did not give respondent's requests to charge. So far as the requests were applicable to the case, those of them that were proper statements of the law were fully and fairly and clearly stated by the trial judge. Under such circumstances, his failure to read the written requests of counsel is not error: *People v. Weaver*, 108 Mich. 649, 66 N. W. 567.

The other assignments of error have been considered. We do not think they are well taken, but do not deem it necessary to discuss them.

The conviction is reversed and a new trial ordered.

The other justices concurred.

APPEAL—REVIEWING SUFFICIENCY OF EVIDENCE.—An assignment of error alleging error in the admission of evidence will not be considered where it fails to set forth the evidence: *Swope v. Donnelly*, 190 Pa. St. 417, 70 Am. St. Rep. 637, 42 Atl. 882.

LARCENY.—TAKING ANOTHER'S PROPERTY UNDER A FAIR COLOR OF CLAIM or title is not larceny, although the taker may be mistaken; and the same is true where the taking is on behalf of another, believed to be the true owner: *Dean v. State*, 41 Fla. 291, 79 Am. St. Rep. 186, 28 South. 638.

RIBICH v. LAKE SUPERIOR SMELTING COMPANY.

[123 Mich. 401, 82 N. W. 279.]

MASTER AND SERVANT—LATENT DANGER—WARNING—MASTER'S DUTY.—Whenever there is any hidden, unusual, or latent danger connected with any work the law imposes a duty on the employer of informing the employé of the danger. It is not enough to tell him that the work is dangerous, but the particular danger must be pointed out and explained.

MASTER AND SERVANT—DANGER OF EXPLOSION—WARNING—MASTER'S DUTY.—When a man is employed at smelting works to dump pots of molten copper mixed with slag at a place where some ice has been melted, it is the duty of the employer to warn the employé as to the dangerous nature of the work, to instruct him that the molten copper and slag is liable to explode on coming in contact with water, and to explain to him the nature, force, and probable effect of such an explosion.

NEW TRIAL—DAMAGES FOR PERSONAL INJURIES—WHEN EXCESSIVE—REMITTING EXCESS.—In an action by an employé against a smelting company for personal injuries caused by the explosion of a pot of molten copper mixed with slag, on coming in contact with water, and resulting in the loss of an eye and severe pain for several months, a verdict for fifteen thousand dollars is excessive where the employé is not wholly incapacitated for labor, and interest on the amount would produce an income greater than his earning capacity before the injury, although the sight of the other eye had been seriously impaired by another accident. Hence, a new trial should be awarded unless the plaintiff will remit from the verdict all in excess of ten thousand dollars.

Case for personal injuries. The plaintiff's employment required him to dump pots of molten copper mixed with slag at smelting works, and where ice had, to some extent, been melted. On his first run of emptying copper and slag mixed the fifth or sixth pot dumped by him exploded, and the molten matter flew into his eyes, destroying one of them. The other eye had been seriously injured by another accident. The time required for the slag to "set" so as to be safe to dump was from eight to thirty minutes. The negligence charged by the plaintiff was the failure to instruct him as to the dangerous nature of the work, and the liability of the copper and slag to explode on coming in contact with water, and as to the danger that might result from an explosion. The plaintiff obtained a judgment for fifteen thousand dollars and the defendant brought error.

A. R. Gray, for the appellant.

A. T. Streeter, for the appellee.

⁴⁰⁴ GRANT, J. 1. The court instructed the jury as follows: "And I charge you on that subject whenever there is

any hidden, unusual, or latent danger connected with any work, the law imposes a duty on the master or employer of informing the workman or employé of the danger. It is not enough to tell him that the work is dangerous, but the particular danger must be pointed out and explained. In this case, if you find from the evidence that there was danger of an explosion from the contact of water with the mixed copper and slag, then I charge you that that was a danger that was known, or that should have been known, to the smelting company, and that it was its duty to warn Ribich, the plaintiff, of that danger, and to explain to him the nature, force, and probable effect of such an explosion."

The objection urged against this instruction is that it was not the duty of the defendant to explain to plaintiff the "nature, force, and probable effect" of such an explosion. It is insisted that the defendant's duty was fully performed when it had instructed him how to do his work; had informed him that it was dangerous to dump the pots before they were sufficiently set, and that an explosion would likely result. The question is one of great practical importance in the law of negligence. The only authorities cited in the briefs of either counsel are *Smith v. Peninsular Car Works*, 60 Mich. 501, 1 Am. St. Rep. 542, 27 N. W. 662, and *Fox v. Peninsular etc. Color Works*, 84 Mich. 676, 48 N. W. 203. I must assume that counsel have made a careful examination of the authorities, and are unable to cite any which afford much light upon the question. After as careful an examination as I have been able to make, I do not find the question now presented discussed to any extent, or any authoritative declaration of law applicable to this case. In the *Smith* case the plaintiff was engaged in carrying a ladle of molten iron from one building to another, ⁴⁰³ whereby it became necessary to walk over ground covered with ice and water. The occurrence was an unusual one, made necessary by the fact that the fires had gone out in one room. No instructions or information were given as to the danger of an explosion if the molten iron came in contact with the water. The court below had directed a verdict for the defendant, evidently upon the ground that the plaintiff had assumed the risk. The language of the majority opinion does not go to the extent of the instructions now complained of. It is as follows: "Where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible."

It was further said that it was the duty of the defendant to inform the plaintiff "somewhat of its dangerous character." This language falls far short of holding that it was the duty of the defendant in that case, in addition to instructing him how to do the work and notifying him that there was danger of an explosion if the molten iron was spilled upon the ice, to also inform him of the "nature, force, and probable effect" of the explosion.

The Fox case simply holds that it was the duty of the defendant to notify its employé, the plaintiff, of the danger and effect of inhaling Paris green, and the precautions necessary to prevent the injurious effect. Neither of these cases supports the soundness of the instruction now under consideration.

The evidence from several witnesses on the part of the defendant was very strong that plaintiff was fully instructed how to do the work, the reason for thus doing it, and the danger of an explosion if the pots were dumped before the contents were sufficiently "set." Under this instruction the jury may have found that this was true, and have based their exceedingly large verdict upon the failure of the defendant to further notify the plaintiff of the "nature, force, and probable effect" of the explosion. It is not quite clear to me what a jury would understand ⁴⁰⁶ by the "nature" of an explosion, or why its nature, whatever it is, should have been explained to the plaintiff. If, by the information conveyed, he knew that there was danger of an explosion, what more notice did he require for his own protection? Should he have been told that it might kill him, it might burn him, it might put out his eyes, or it might blow off a limb? All these things and others might be the effect of the explosion. This would depend upon its severity, which might be different on different occasions. If a fireman employed about an engine is informed of the liability to explosion if the boiler is not kept sufficiently supplied with water, and is told what to do, in watching the water-gauges, etc., is the employer bound to inform him further of the "nature, force, and probable effect" of an explosion? Must he inform him that pieces of the engine may strike him and hurt him or kill him, and that steam will scald him? Where one employed to use kerosene or naphtha in lighting lamps or running engines is instructed how to do the work, and warned that an explosion may occur if the work is not done as directed, is it the duty of the employer to further inform him of the "nature, force, and probable effect" of an explosion, and that it will burn or injure

him in other ways? It may be safely granted, and is undoubtedly true, that even an educated man would not be aware of the danger of an explosion from dumping this hot slag upon water or ice. But when he is notified that if it is dumped there under those conditions an explosion will follow, would not the average man understand that he was liable to be injured? Is it not a matter of common knowledge that explosions are liable to cause injury? In dumping this slag plaintiff was obliged to stand close to and almost over the cone as it went upon the ice. Did he need to be told that if there was an explosion the hot metal would fly, and he was liable to be injured? There could not be an explosion without something flying. The only thing there was to fly was the molten slag, or the outside that had become somewhat hardened.

⁴⁰⁷ The authorities are uniform, and hundreds of cases could be cited holding that the law is that "if there are latent defects or hazards incident to an occupation of which the master knows, or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating, it is the master's duty to warn or inform the servant of them": *Consolidated Coal Co. v. Haenni*, 146 Ill. 626, 35 N. E. 162; *Beach on Contributory Negligence*, sec. 359; 1 *Shearman and Redfield on Negligence*, sec. 203, note 5; *Wharton on Negligence*, sec. 206. Reasonable notice, in order that the employé may, by the exercise of due care, avoid the danger, is all that the law requires. Is not the law satisfied when the party has been fully instructed how to do the work, and is told that there is danger of explosion, and his work requires him to be in close proximity to the explosion if it occurs? I think it is. If the employé desires any further information before assuming the risk, he should be held to make further inquiries.

The question of instruction and warning has arisen more frequently in the employment of infants, where the employer is held to more explicit instructions and warnings than in the case of adults: 1 *Shearman and Redfield on Negligence*, sec. 46, note 1. The authorities are meager in determining what is a sufficient warning. Much must depend upon the circumstances of each case in applying the rule. In *Powers v. Calcasieu Sugar Co.*, 48 La. Ann. 483, 19 South. 455, plaintiff accidentally stepped into a ditch of hot water in the evening and was severely scalded. Defendant's manager testified that he told the plaintiff "to be careful; that there was a ditch along

the side, and the floor was uneven." It was held that the admonition was insufficient. The court said: "If an admonition of danger is relied on, it must be timely and explicit," and held that the defendant should have informed him that the water in the ditch was hot. Where the negligence alleged was in permitting a plaintiff to pick up sodium and potassium and put them into water, without warning him of their dangerous and explosive nature when placed in contact ⁴⁰⁸ with water, it was held that proof of knowledge of facts which would naturally suggest it was all that the law required: *Hill v. Meyer Brothers' Drug Co.*, 140 Mo. 433, 41 S. W. 909. The ordinary man knows the effect of dangerous elements. It is the common education of all. He knows that hot water and steam will scald; that fire will burn; that water will drown; that explosions of powder, dynamite, oil, naphtha, and molten matter will injure. When he is instructed how to handle these elements in order to avoid explosion, and is informed that there is danger of explosion if he does not handle them as instructed, he has received from his employer all the warning that the law requires. I think that the instructions were erroneous.

2. It is earnestly urged by counsel for defendant that the court should have directed a verdict for it, because the evidence conclusively shows that if plaintiff, as he testified he did, took the pot in its order and dumped it, no explosion could possibly have occurred. This would require us to find that it took a half hour or more to fill the pots, while there is testimony that it took less time. It would also require us to leave out of consideration an important piece of testimony from Mr. Franz, plaintiff's coemployé and a witness for defendant, that he told plaintiff just before the explosion: "You better leave them set a little while; they are too hot." The court explicitly instructed the jury that if this witness so informed plaintiff, he could not recover. The contention upon this point cannot prevail.

3. Plaintiff alone testifies that no instructions or warning were given him. Several witnesses testify that they were given. Counsel strenuously urged that the preponderance of evidence is so great in favor of defendant that this court should grant a new trial, under a statute now authorizing this court to review motions for a new trial. Inasmuch as, in my judgment, the case should be reversed on other grounds, we need not consider this question.

4. Complaint is made that the verdict is excessive, and that for this reason the court should have granted a new ⁴⁰⁰ trial. The statute above referred to imposes the duty upon us to review this question, and however unpleasant this duty may be, we have no right to escape it. Plaintiff lost the sight of one eye. His left eye had been seriously injured by another accident. His own physician testified that he had thirty per cent of normal sight of his left eye. He was in a hospital four weeks, because his physician told him that he did not want to attend the case or be responsible unless he was removed to some place where he could get better care and nursing than he could get in his boarding-house. He testified that he was better at the trial than when he came out of the hospital. "I was suffering from pain then nearly as bad as at the time I got burned. I could not tell the pain I suffered, but it was about two months after that. I was suffering about two months after that very bad. I have had pain since the two months."

He is not deprived of all ability to labor. Soon after leaving the hospital he worked for defendant several months, helping teamsters, and earned from fifteen dollars to twenty dollars a month. Before he was hurt he earned one dollar and sixty cents per day. At four per cent, the fifteen thousand dollars would yield an annual income of six hundred dollars—one hundred dollars more than he could earn before he was injured. At three per cent, it would yield four hundred and fifty dollars, which is within fifty dollars of what he could earn if he labored every working day in the year, including holidays. Counsel cite *Retan v. Lake Shore etc. Ry. Co.*, 94 Mich. 146, 53 N. W. 1094, where a verdict for thirty thousand dollars was sustained. That case was decided before the statute above mentioned was passed. Besides, there is no parallel between that case and this. In that case, by the loss of both feet, the plaintiff was a helpless cripple for life, and was deprived entirely of the power of locomotion. I cannot avoid the conclusion that the verdict is excessive. As the verdict should be set aside upon other grounds, and as the testimony upon another trial may be different, it is unnecessary to determine upon this record by how much we think the verdict should be reduced, or a new trial ordered. On the question of excessive verdicts, see *Standard* ⁴¹⁰ *Oil Co. v. Tierney*, 92 Ky. 367, 36 Am. St. Rep. 595, 17 S. W. 1025.

Judgment should be reversed and a new trial ordered.

MONTGOMERY, C. J. I am not able to agree with my brother Grant that there was error in the instruction given. In *Smith v. Peninsular Car Works*, 60 Mich. 501, 1 Am. St. Rep. 542, 27 N. W. 662, it was said that where extraordinary risks are or may be encountered, if known by the master, or should be known by him, the servant should be warned of them, their character and extent, so far as possible. I do not think the instruction which imposed upon the defendant the duty of explaining to plaintiff "the nature, force, and probable effect" of such an explosion as would be likely to occur from the contact of water with mixed copper and slag, fairly construed goes beyond the doctrine of the *Smith* case. It is a reflection upon the intelligence of the jury to assume that they would construe this language as imposing upon the defendant the duty of foretelling the precise result of any possible explosion. What the language fairly imports is that it was the duty of the defendant to warn the plaintiff that the explosion would be of such a nature and such force as would be likely to cause injury, and so construed the instruction is within the rule of the *Smith* case.

I agree with my brother Grant that we should not evade the responsibility of ordering a new trial where a substantial injustice is clearly shown. In my judgment, the verdict in this case is excessive, and a new trial should be awarded unless the plaintiff will remit from the verdict all in excess of ten thousand dollars.

Hooker, Moore, and Long, JJ., concurred with Montgomery, C. J.

MASTER AND SERVANT—LATENT DANGER—WARNING—MASTER'S DUTY.—Employers owe it as a duty to inexperienced employes to point out the dangers of which they themselves have, or ought to have, knowledge, and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care. Most especially should this duty be performed where the dangers and the means of avoiding them are not apparent or fully within the comprehension of the servant: *Chicago etc. Brick Co. v. Reinneiger*, 140 Ill. 334, 33 Am. St. Rep. 249, 29 N. E. 1106; *Reynolds v. Boston etc. R. R. Co.*, 64 Vt. 66, 33 Am. St. Rep. 908, 24 Atl. 134. A warning of danger is not sufficient to exonerate an employer, unless it discloses to the employe of what the danger consists and how to avoid it: *Reynolds v. Boston etc. R. R. Co.*, 64 Vt. 66, 33 Am. St. Rep. 908, 24 Atl. 134; *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200, 27 N. E. 502.

NEW TRIAL—DAMAGES—WHEN EXCESSIVE—REMITTING EXCESS.—When damages appear to be excessive, a court may either grant a new trial absolutely or give the plaintiff the option

to remit the excess or a portion thereof, and order the verdict to stand for the residue: *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80. When a verdict for damages is so large that it can be accounted for only as the result of an improper sympathy or unreasonable prejudice, it will be set aside as excessive: *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 389, 29 Am. St. Rep. 378, 14 S. W. 357.

MARKHAM v. HUFFORD.

[123 Mich. 505, 82 N. W. 222.]

WILLS.—Illustrations of conditions precedent.

WILLS—QUESTION OF CONDITIONS IS ONE OF INTENTION.—In construing a will, the question as to whether an act on which an estate depends is a condition precedent, or a condition subsequent is one of intention and not of phrase or form.

WILLS—REFORMATION OF BAD HABITS—VALID CONDITION PRECEDENT.—It is a valid condition to require the reformation of bad habits. Hence, a provision in a will for the payment of a legacy to a person at the expiration of two years from the date of the testator's demise, provided that he shall be deemed a reformed man, in the judgment of the executors of the will, does not constitute a vested interest, but is a valid condition, and is not void for uncertainty.

Walker & Fitz Gerald and Myron H. Walker, for the appellants.

Lombard & McAllister, for the appellee.

505 **HOOKE**, J. The testatrix, Mary C. Jones, left a will containing the following provisions:

"1. To Almon L. Markham, the son of my daughter, Julia J. Markham, deceased, I give and bequeath the sum of five hundred dollars (\$500), to be paid to him at the expiration of two years from the date of my demise; provided, that he shall be deemed a reformed man, in the judgment of the executors of this will.

"2. To my granddaughter, Mary Maud Markham, I give and bequeath the sum of five hundred dollars (\$500), not to be paid to her until she has attained the age of twenty (20) years, unless it be necessary, in the opinion of the executors, and then not to exceed the sum of one hundred and fifty dollars (\$150); the balance to be paid at the time specified above, if any disbursement is made.

"3. In the event of the demise of either or both of the aforementioned persons before the time for the payment of the

several amounts due them, then I direct that their shares shall revert to the Society of Women's Christian Temperance Union, to be paid to the Union of Unions of the city of Grand Rapids, and to be by them used for the advancement of the temperance work, without reservation."

Several other bequests followed, and then the following:

"8. And all the balance of my estate, both personal and real, or which may accrue or of which I may be possessed of at the time of my decease, I do give and bequeath unto my son, William Hoyle Jones.

"It is my request that the estate be settled up within three (3) years after my demise. I also give the executors the privilege of disposing of any or all of the estate at public or private sale, as they may deem best for the interest of the estate.

"I hereby appoint Silas L. Hufford, of Walker, and William Hoyle Jones, both of the state of Michigan, executors of this, my will."

The will was duly probated and the persons named as executors accepted the trust and qualified. The inventory of the estate bears date May 20, 1892.

In October, 1898, Almon L. Markham filed a petition in the probate court, praying an order that the executors pay ⁵⁰⁷ him his legacy. This was followed by an amended petition. Upon a hearing the probate court denied the relief, and the cause was tried in the circuit court upon appeal. The findings of fact and law disclose, among other things, that on January 18, 1896, Almon L. Markham filed in probate court a petition, alleging the will and its admission to probate, and that more than two years had expired, and that he was a reformed man and was entitled to his legacy. It prayed that the executors be cited to show cause why they had not paid the legacy, and in case of their failure to do so, that they be discharged from their office, and petitioner be authorized to bring an action upon their bond in the circuit court. A hearing was had and it was held that the petitioner was not entitled to the relief prayed. No appeal was taken, and such order stands unreversed. In the present proceeding the circuit court failed to pass upon the question of petitioner's reformation, and in the finding of law held that petitioner took a vested legacy, and that the conditions attached were indefinite, uncertain, and void. It was also found that petitioner was entitled to his legacy, with interest at six per cent from May 11, 1896, and costs, all to be paid out of the estate by the executors. The defendants have ap-

pealed. They claim: 1. That the legacy was not a vested one; 2. That regardless of that question, the condition was a valid condition precedent; 3. That the claim is barred by the former adjudication in the probate court.

The intention of the testatrix, if it can be ascertained, must settle the construction to be placed on this bequest. The section, considered by itself, would, in our opinion, impress the average mind as not ambiguous, and would be interpreted to mean that if, at the expiration of two years from the demise of the testatrix, the executors should deem the petitioner a reformed man, they should pay him five hundred dollars from the estate; otherwise not. Very few would understand from this language that, if not deemed to be ⁵⁰⁸ reformed, he should still receive the bequest at a later date, and that distant but a year. "A conditional legacy is defined to be a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place or to be defeated. No precise form of words is necessary in order to create a condition in a will, but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect": 2 Williams on Executors, 7th Am. ed., 558, and cases cited.

We are satisfied that the intention of the testatrix was that her grandson should not have this money unless within two years after her death he should change his course of conduct, and she selected persons in whom she had confidence to determine the question at the proper time. It was left to their judgment, and the inference is that they knew the petitioner's faults. Unless at that time the executors should determine that he was a reformed man, the provision would be inoperative. It was unnecessary for her to make a record of petitioner's faults. It is a valid condition to require the reform of bad habits: *Dustan v. Dustan*, 1 Paige, 509; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353. A condition which involves anything in the nature of consideration is, in general, a condition precedent: *Theobald on Wills*, 263. In *Finlay v. King*, 3 Pet. 346, Chief Justice Marshall said: "It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause or of the whole will shows that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, precedent,

and unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it—if this is to be collected from the whole will—the condition is subsequent.”

⁵⁰⁹ It is in all cases a question of intention, and not of phrase or form. In support of this, see 4 Kent's Commentaries, 124; Flood on Wills, 283; 2 Redfield on Wills, 283; 2 Washburn on Real Property, 5th ed., 7 (*446); Nicoll v. New York etc. R. R. Co., 12 N. Y. 121; Barruso v. Madan, 2 Johns. 145; Robbins v. Gleason, 47 Me. 259; Burnett v. Strong, 26 Miss. 116; Ward v. New England Screw Co., 1 Cliff. 565, Fed. Cas. No. 17,157; Creswell v. Lawson, 7 Gill & J. 240; Hayden v. Stoughton, 5 Pick. 528; Jackson v. Kip, 8 N. J. L. 241; Bowman v. Long, 23 Ga. 247.

The following have been held precedent conditions: If he lives three years, with limitation over if he dies within that time: Buck v. Paine, 75 Me. 582. If he attains the age of twenty-one years (Jones v. Leeman, 69 Me. 489; Kelso v. Cuming, 1 Redf. 392; Bowman v. Long, 23 Ga. 247), it being sufficient if he does so before testator's death: Eisner v. Koehler, 1 Dem. Sur. 277; or although twenty-one, and has in the meantime learned a trade, and is of good moral character, to be determined by executor: Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; or “shall be desirous and capable of entering into business for himself”: In re Davidson's Estate, 17 Phila. 424; or if he withdraws from the Roman Catholic priesthood: Barnum v. Mayor etc. of Baltimore, 62 Md. 275, 50 Am. Rep. 219; Kenyon v. See, 94 N. Y. 563, 29 Hun, 212; or releases testator's note held by him: Howard v. Wheatley, 15 Lea, 607; or survives testator: Gibson v. Seymour, 102 Ind. 485, 52 Am. Rep. 688, 2 N. E. 305; or if he aid in the defense of a certain suit, to the satisfaction of the executor: Cannon v. Apperson, 14 Lea, 553; or to A., for her support, “if she shall lose any part of her own property and need more” for her support: Ely v. Ely, 20 N. J. Eq. 43; or “when she should be sick and unable to support herself”: Reynolds v. Denman, 20 N. J. Eq. 218. So, a power to sell “if income be not sufficient for support”: Minot v. Prescott, 14 Mass. 496. In 1 Roper on Legacies, 562, it is said: ⁵¹⁰ “A fifth instance of exception must be made out of the positive rule applicable to the vesting of legacies where the gift of the legacy and the time of payment are in terms distinct, when the period for payment is contingent, as upon the marriage or the taking of holy orders of the legatee; for in neither of those instances will the legacy vest before the

happening of the contingency, as we have seen it would have done had the time of payment been certain. The distinction is founded upon the following reasoning: It must be inferred that where the time is certain, as when the legatee attains the age of twenty-one, the testator merely postponed the payment of the legacy in consideration of the legatee's unfitness to manage his affairs prior to that period; but when the event annexed to the payment may or may not happen, it is to be presumed that the expectation of its taking place was the sole motive, and therefore of the essence of the bequest."

The provision under discussion was, in our opinion, intended as a condition precedent; and it should not be defeated by the failure to specifically provide for the disposition of the fund, or by an inaccurate use of the word "revert" in the third section of the will.

We think that the bequest did not constitute a vested interest, and that the condition is not any more uncertain than it would have been had the will required payment of the legacy, provided the executors should at a given date deem petitioner worthy of it. The provision cannot be distinguished in principle from any other bequest depending upon the happening of an uncertain event.

It becomes unnecessary to decide the third question raised, though there is much force in the claim that this proceeding is barred by the former adjudication.

The order of the circuit court is reversed and no new trial ordered.

The other justices concurred.

WILLS—CONDITIONS PRECEDENT AND SUBSEQUENT—WHAT ARE—DISTINCTION.—There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction, and whether a condition is one precedent or subsequent depends upon the intention of the party creating it: *Burdls v. Burdls*, 98 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462.

DEVISE UPON CONDITION THAT DEVISEE REFORM.—A condition attached to a devise in a will, providing that the devisee named shall only take thereunder if, at the expiration of ten years from the death of the testator, the devisee shall have become, in the judgment of the executors of the will, permanently and thoroughly reformed of intemperate habits, immoral consortings and associations, and should then be living, with evident promise to continue to live, virtuous and temperate for the remainder of his life, is valid and binding on the executors and on the devisee, and will be upheld: *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391, 46 N. W. 422.

HICKEY v. O'BRIEN.

[123 Mich. 611, 82 N. W. 241.]

CONTRACTS TO SUPPLY GOODS TO ANSWER NEEDS OF BUSINESS.—If one agrees to furnish to another all ice that the latter may require in his business for the period of five years, and the latter agrees to buy such quantity for that period, the purchaser agrees to take ice for the period of five years, and the quantity which he agrees to take is to be measured by the necessities of his business, which is presupposed to exist for the time agreed. The purchaser cannot, therefore, avoid liability on the contract by transferring his business within such period.

Replevin by Hickey against O'Brien, Lucas, and Michel. The plaintiff obtained judgment and the defendant O'Brien brought error.

James H. Davitt, for the appellant.

E. L. Beach, for the appellee.

612 MONTGOMERY, C. J. In 1895 Kreutzberger & Crabbe were engaged in the business of furnishing ice to their customers in Saginaw. John F. Lucas & Co. were also engaged in the ice business, and had equipment and conveniences for putting up ice in large quantities. On the 1st of March, 1895, a contract, to which John F. Lucas & Co. were designated as parties of the first part and Kreutzberger & Crabbe were parties of the second part, was executed by the parties. Its material provisions were as follows:

"In consideration of the covenants and conditions herein-after mentioned, first parties hereby agree to furnish second parties with all the ice that they may require to carry on their ice business in said city for the period of five years from and after March 1, 1895, at the rate of seventy-five (.75) cents per ton, to be paid for monthly from and after June 1, 1895.

"Second parties hereby agree to purchase from first parties all the ice necessary to carry on their ice business in said city for the period of five years from and after March 1, 1895, and to pay first parties therefor the sum of seventy-five (.75) cents per ton, to be paid monthly from and after June 1, 1895.

"It is hereby further agreed by and between the parties hereto that should first parties, during the continuance of this contract, be compelled, by reason of an open winter or otherwise, to harvest ice at a point distant from the Saginaw river, that second parties shall pay the first parties, in addition to the

seventy-five (.75) cents per ton hereby agreed on, the additional cost per ton to first parties in harvesting, delivering, and caring for said ice during that season or seasons.

"It is hereby further agreed by and between the parties hereto that second parties shall at all times keep accurate and correct books of account of their ice business during the continuance of this agreement, and that the books of account so kept shall at all times be open to the access and inspection of the first parties."

⁶¹⁸ Kreutzberger & Crabbe continued to conduct the ice business until about December 19, 1896, when plaintiff claims to have purchased the property of the firm of Mr. Crabbe. John F. Lucas & Co. brought an action against Kreutzberger & Crabbe to recover damages for the breach of the contract on their part, instituting proceedings by attachment on the property which was transferred to plaintiff by Crabbe. The defendant O'Brien is a deputy sheriff, and seized the property by virtue of the attachment. This action is replevin for the property so seized. On the trial it was conceded that Kreutzberger & Crabbe had paid Lucas & Co. for all ice actually delivered, and that the claimed indebtedness named in the attachment suit was for damages for the breach of their contract to take ice at the price stipulated.

The circuit judge charged the jury as follows: "Before you can find a verdict for the defendants in this case, you must find that the property in dispute is the property of Crabbe and Kreutzberger, or either one or the other. If Hickey actually purchased the property, it makes little difference what he paid for it, as Lucas and Michel never had any lien upon the property in question, and Crabbe and Kreutzberger had a perfect right to sell it to anyone they saw fit; or, as the testimony shows in this case, that Crabbe claimed to be the owner, and not Kreutzberger, and he had a perfect right to sell the property, if he had it, for the sole purpose of getting rid of the Lucas and Michel contract; and if Hickey purchased the property knowing the contract between Crabbe and Kreutzberger and Lucas and Michel was in existence, then the plaintiff in this suit is entitled to a verdict, because he had perfect right to purchase it, and Crabbe had perfect right to sell it."

This instruction was based on a view that the contract did not bind Kreutzberger & Crabbe to take ice for any stated time. If the circuit judge was right in this, the other questions in the case appear to us of little moment; for if the contract be so con-

strued, there is no indebtedness to Lucas & Co. to support the attachment, and they were not, therefore, in a position to question the bona ⁶¹⁴fides of the transaction. If, on the other hand, the contract bound Kreutzberger & Crabbe to take ice at the fixed price for five years, it can scarcely be claimed that the instruction quoted was correct. The cases which deal with contracts to supply goods to answer the needs of business are not in entire harmony. In *Bailey v. Austrian*, 19 Minn. 535, it was held that a contract to supply plaintiffs with all the pig-iron wanted by them until a certain date was nudum pactum, as plaintiffs did not engage to want any quantity whatever. A similar holding was made in Iowa in the case of *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465. In *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 34 Am. St. Rep. 341, 54 N. W. 39, we had occasion to consider the case of *Bailey v. Austrian*, 19 Minn. 535, but did not in terms decide whether such engagement bound the orderer to take any particular quantity. In *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, the case of *Bailey v. Austrian*, 19 Minn. 535, is considered as to its bearing on the question here involved. The court point out that in the *Bailey* case stress is laid on the word "want." In the Illinois case cited the plaintiff agreed to sell to the defendant all the iron needed in its business during the three ensuing years at twenty-two dollars and thirty-five cents per ton. The defendant agreed to take its year's supply at that price. The court say: "We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed on this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron; but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron ⁶¹⁵elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year; that is, such a quantity of

iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business": See, also, *Smith v. Morse*, 20 La. Ann. 220; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142.

In the present case, we think the true construction is that *Kreutzberger & Crabbe* undertook to take ice of *Lucas & Co.* for the period of five years; that the quantity which they agreed to take was to be measured by the necessities of their business, but that this presupposed that they would have a business for the time agreed.

The judgment will be reversed and a new trial ordered.

The other justices concurred.

CONTRACTS TO SUPPLY GOODS TO MEET REQUIREMENTS OF BUSINESS.—When a carriage manufacturer gives an order for such quantity of wheels as he may require during a certain season, at a specified price, and the order is accepted by the orderer and one or more lots of wheels are furnished thereunder, the order becomes a valid and binding contract for the entire season: *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 34 Am. St. Rep. 841, 54 N. W. 89.

SHAW v. CHICAGO & GRAND TRUNK RAILWAY CO.

[123 Mich. 629, 82 N. W. 618.]

RAILROADS—NEGLIGENCE IN PERMITTING THROWING OUT MAIL BAGS.—A declaration alleging that a railroad company, by its servants, "made a practice" of permitting and allowing a mail pouch to be ejected from one of its through trains in a negligent manner, sufficiently avers the company's knowledge of the dangerous practice.

RAILROADS—THROWING OUT MAIL BAGS—EVIDENCE OF PREVIOUS ACTS.—In an action against a railroad company for injuries caused to a prospective passenger sitting in the waiting-room at a station, by the negligent ejection of a mail pouch, which went through a depot window, evidence of the mail agent's previous negligent acts in throwing out the pouch should be submitted to the jury where the previous acts were such that, in common prudence, the defendant ought to have anticipated that such an accident was liable to happen.

RAILROADS—MAIL AGENTS, LIABILITY FOR ACTS OF. A railroad company is not primarily liable for the negligence of a mail agent, but it does owe the duty of not permitting dangerous habits of the agent, in delivering heavy packages from the car in such a manner as to endanger persons lawfully on its premises, to continue; and evidence of such a practice, continued for a considerable period, is notice to the company, which is answerable for the nonperformance of such duty.

NEGLIGENCE—THROWING MAIL BAGS FROM TRAIN—EVIDENCE OF SIMILAR REMOTE TRANSACTION.—In an action for personal injuries caused by the negligent throwing of a mail pouch from a train at a station, evidence of a similar transaction occurring thirteen or fourteen years before the trial is not improperly admitted, though it might properly have been stricken out on motion as remote.

NEGLIGENCE — MISUSE OF PAPER BY COUNSEL — WRONGFUL CONSTRUCTION—NONREVERSIBLE ERROR.—In an action for personal injuries the defendant is not injured by the admission in evidence of a paper containing no admission of liability on his part, such as a notice to another, whose negligence caused the injuries, tendering him control of the suit, and the improper use of such paper by counsel in argument, who wrongfully construe it as an admission of the defendant's liability, is not reversible error where the judge cautions the jury not to so interpret it.

NEW TRIAL—DAMAGES FOR PERSONAL INJURIES.—In an action for personal injuries, which were not only very painful but which caused permanent disfigurement to an eye and loss of its sight, a verdict for seven thousand dollars damages is not so grossly excessive as to require any interference.

Case for personal injuries brought by Mary L. Shaw, an infant, against the company. She obtained judgment and the defendant brought error.

E. W. Meddaugh, Geer & Williams, and L. C. Stanley, for the appellant.

Dean & Hooker, for the appellee.

631 MONTGOMERY, C. J. Plaintiff went to defendant's station at Millett at about the hour of 7:30 A. M. on the morning of July 4, 1898, to take a local train for Lansing, due at Millett at 8:17 A. M. Defendant's train No. 1, west-bound, was due at Millett at 7:35 A. M. This train carried mail, but was not scheduled to stop at Millett. Mail had been carried on this fast train since some time in 1893, during which time the mail sack had been thrown off and picked up at this station while the train was in motion. The plaintiff was in the station, sitting near the window at the northeast end of the building. The bottom of the window was three feet above the floor, and the window was near the center of the east wall of the building, which was sixteen feet in width and thirty-two feet in length. The platform in front of the building was twelve feet in width, and the rail nearest the platform would be about three feet distant from the platform. The evidence shows that the mail bag was either kicked or thrown from the car door, and went about eighteen feet to the east and thirty feet to the southwest. In other words, it was thrown from

the car when the train was thirty feet distant from the station, and was thrown eighteen feet away from the car. The mail pouch did not strike the ground, but went through the air sufficiently high to go through the window three feet above the ground, breaking the sash and panes out. The glass from the broken window struck the plaintiff in the eye, which has resulted in total loss of ~~see~~ sight in that eye, and caused a disfigurement of the eye. In an action against the railroad company, plaintiff recovered a verdict of seven thousand dollars, and defendant brings error.

It is insisted that the declaration states no cause of action, and that error was committed in admitting any evidence under the declaration. The declaration contains the following averments:

"That while the said plaintiff was lawfully upon the premises of said defendant upon said day and year aforesaid, and while seated within said depot of said defendant next to the window at the northeast end of said depot, upon a seat placed in said depot for the convenience and use of prospective passengers of said railroad company aforesaid, a certain fast west-bound train, commonly known as a 'mail train,' and scheduled to arrive at the station of Millett aforesaid at 7:35 o'clock, or thereabout, in the morning of the day and year aforesaid, and each day of the week during which time it was so scheduled to arrive, passed through said station of Millett aforesaid at a high rate of speed, which said train was scheduled by said railroad company not to stop at said station of Millett aforesaid, but to pass through said place or settlement without stopping, and which said train carried mails for the government of the United States of America, and from which train it was the practice of the mailing clerk or agent on said west-bound train to eject a mail pouch or bag at said station of Millett, from the mail-car attached to and a part of said train, while said train was in motion and running at a high rate of speed; and said mailing clerk or agent, on the said fourth day of July, 1898, aforesaid, ejected said mail pouch or bag aforesaid from the door of said mail-car aforesaid at said station of Millett aforesaid in manner aforesaid.

"That it was the custom and practice of said defendant, through its servants, to allow said mail pouch or bag aforesaid to be ejected from its said fast west-bound mail train so scheduled to arrive at and pass through said station of Millett as

aforesaid without stopping, and while running at a high rate of speed.

"And thereupon, to wit, the fourth day of July, 1898, and upon all such days upon which said west-bound mail train was scheduled to arrive at and pass through said station of Millett aforesaid without stopping, and at the said station of Millett aforesaid, it became and was the ⁴³³ duty of said defendant to manage and conduct its said west-bound mail train aforesaid, by its said servants or servant, with all due care, caution, and diligence, and in a manner which would afford safety to those persons or that person who might be lawfully upon the premises of said defendant aforesaid. Yet the said defendant did not regard its duty, and use due care, caution, and diligence, but, on the contrary thereof, by its said servants or servant, made a practice and custom of allowing and permitting said mail pouch or bag aforesaid to be ejected from said west-bound mail train in a manner and at a place which subjected the persons or person who might chance to be lawfully upon the premises of said defendant at the time and place aforesaid, or on any day upon which said west-bound mail train aforesaid was scheduled to so arrive, to hazard and danger of injury; and upon the said fourth day of July, 1898, while the said plaintiff was so seated in said depot of said defendant as aforesaid at said station of Millett, the plaintiff being then and there lawfully, and in and about her proper business, and in the exercise of due care, caution, and diligence, and without negligence or fault on her part, the said defendant, through its negligence and the negligence of its said servants or servant, allowed and permitted said mail pouch or bag aforesaid to be so ejected from said west-bound mail train afoersaid while in motion, and while running at a high rate of speed, and at such a place on said premises that it struck the said window upon the northeast end of said depot aforesaid, and, breaking through said window aforesaid, caused said plaintiff to be struck in the left eye by said mail pouch or bag aforesaid."

It is said that the declaration fails to state defendant's duty; that it states inferences, and not facts; that there is no averment that the defendant knew of the dangerous practice of discharging the mail bag. It is alleged, however, that the defendant, by its servants, made a practice of permitting and allowing the mail pouch to be ejected in a manner and at a place which subjected the person or persons who might chance to be lawfully upon the premises to hazard. This averment implies

knowledge, and, if not deemed sufficiently specific, should have been demurred to: See *Fox v. Iron Co.*, 89 Mich. 387, 50 N. W. 872.

⁴³⁴ The plaintiff offered testimony tending to show that for a considerable period of time the mail agent had, in ejecting the bag, occasionally thrown it so that it struck upon the platform intended for passengers, at times struck the depot building, and once or twice it was known to go into the open door of the depot. It is contended that this evidence was "incompetent and immaterial, for the reason that it did not furnish a basis for the jury to find that the defendant knew that the practice of discharging the mail bag at this station was likely to cause the injury complained of here; that is, that the defendant might anticipate or expect that the mail bag would be thrown through the window, and injure some person on the inside of the waiting-room."

It is said that: "The most that defendant could have anticipated or expected (if the evidence was properly admitted) would be that some person who might be standing on the platform or cinder bed might be hit by the mail bag."

It is true that on no previous occasion did the mail bag go through the window, but it did strike against the end of the building. The building was sixteen feet wide, and the window in the center, so that, in striking against the corner of the building, it must have struck near the window. We think it not necessary that the plaintiff show that the mail bag had previously struck at this precise place. The test to be applied should be, Were the previous acts such that, in common prudence, the defendant ought to have anticipated that such an accident was liable to happen? And the evidence in this case was such as to make it proper to submit the question to the jury, as the circuit judge did.

This question has never been presented to this court before, but in a number of the states almost the precise question has been passed upon. We think a fair statement of the law as established by the decisions is this: The railroad company is not primarily liable for ⁴³⁵ the negligence of the mail agent, but it does owe the duty of not permitting dangerous habits of the agent in delivering heavy packages from the car in such manner as to endanger persons lawfully on its premises to continue; and evidence of such a practice continued for a considerable period is notice to the company: *Snow v. Fitchburg R. R. Co.*, 136 Mass. 552, 49 Am. Rep. 40; *Galloway v. Chicago*

etc. Ry. Co., 56 Minn. 346, 45 Am. St. Rep. 468, 57 N. W. 1058; Carpenter v. Boston etc. R. R. Co., 97 N. Y. 494, 49 Am. Rep. 540. The cases cited by defendant's counsel (Muster v. Chicago etc. Ry. Co., 61 Wis. 325, 50 Am. Rep. 141, 21 N. W. 223; McGrath v. Eastern Ry. Co., 74 Minn. 363, 77 N. W. 136; Southern Ry. Co. v. Rhodes, 86 Fed. 422) do not, as we read them, deny any of the propositions above stated.

Mr. Crane, a witness for plaintiff, was asked whether he was present at one time when an old gentleman was hit by a mail bag on the platform. It was objected to as immaterial and incompetent. The answer was given in the affirmative. On the cross-examination it developed that this transaction occurred some thirteen or fourteen years before the trial. The cross-examination developed that the transaction was remote from the time of the injury to plaintiff, and a motion to strike out would have been proper; but no such motion appears to have been made. The question itself was not improper, nor did the defendant's counsel ask to have the question limited as to time, or suggest that the time was too remote. There was no error in the ruling.

The plaintiff called as a witness the mail agent who threw the bag causing the injury, and in connection with his testimony offered in evidence a notice given by the attorney of the company notifying him of the pendency of the suit, stating, among other things: "You are notified that your act caused said injury, and your negligence, if any, occasions said action," and stating that he would be held responsible to answer and pay any verdict recovered, and tendering him control of the suit. The purpose ^{use} of introducing this paper is not stated. It may have been to show the interest or bias of the witness; but as his interest already appeared, it is difficult to see how the paper became important. We do not discover how its bare introduction could have damaged defendant. The paper contained no admissions of liability on the part of the company.

In the argument plaintiff's counsel referred to this notice as follows: "Why did they serve notice on him to come in and help defend the suit? They knew a judgment stared them in the face; they knew their negligent acts made them liable and responsible for it."

This was excepted to. The circuit judge began his charge as follows: "Before I give you the law in the case, I think I had better suggest to you something briefly regarding one

suggestion made by Mr. Dean in his argument, and that is about the notice served upon Mr. Fulton. I thought possibly, in his zeal, he might have said something that you might misconstrue. As a matter of fact, he did not say anything really out of place. That notice the railroad company had a perfect right to serve. It was a fair and proper thing for it to do. It was not served on the government; it was served on Mr. Fulton, an employé of the government, to protect its legal rights. Should a judgment be rendered against it, if it desired or felt that Mr. Fulton was the man that should pay any damages, should any be rendered, it had a perfect right to serve that paper. I want to call your attention more particularly that the fact of serving that paper is not an admission that it is liable, and you ought not to find it so from the fact of serving that paper."

While it is manifest that counsel made an improper use of this paper as evidence of an admission by defendant, it is equally manifest that the court took pains to remove any false impression from the minds of the jury. We do not think the judgment should be disturbed on this ground, as we feel satisfied that the jury could not have failed to understand the caution of the court. ⁶³⁷ Other exceptions were noted to the argument of counsel. We do not find in it any such abuse of privilege or distortion of the evidence as called for the interposition of the court.

Error is assigned on the refusal of the court to grant a new trial. We do not find the verdict so clearly against the evidence as to justify us in reversing it on that ground. We also think that there was evidence to support the theory given to the jury by the charge.

As to the claim that the verdict was excessive, it is true that seven thousand dollars is a large sum. The injury is, however, severe. Besides being very painful, it caused permanent disfigurement to the eye and loss of sight. We do not think the award of damages so grossly excessive as to justify us in interfering.

The judgment will be affirmed, with costs.

Moore, Long, and Grant, JJ., concurred.

Hooker, J., did not sit.

RAILROADS—THROWING OUT MAIL BAGS—DANGEROUS PRACTICE—DUTY OF COMPANY.—While a railway company has no right to interfere with a mail agent in the discharge of his

official duties, its duty is to prevent him, while on its trains and premises, from continuing any negligent practice, of which it has notice, and which is liable to cause injury to passengers and others lawfully there. Throwing loaded mail bags out of a moving train upon a platform occupied by the public is of itself a negligent and dangerous practice, and, where injury results from it, the company may be charged with negligence, without showing that a like injury occurred on some former occasion: *Galloway v. Chicago etc. Ry. Co.*, 56 Minn. 346, 45 Am. St. Rep. 468, 57 N. W. 1058.

NEW TRIAL — DAMAGES FOR PERSONAL INJURIES — WHEN NOT EXCESSIVE.—A verdict for ten thousand dollars damages for being struck and injured by a mail bag thrown from the mail-car of a moving railroad train by a United States mail agent, while slowing up at the platform of a passenger station, is not excessive where the evidence shows that the company had notice of the practice of throwing out loaded mail bags, and that the result was one which might reasonably have been anticipated: *Galloway v. Chicago etc. Ry. Co.*, 56 Minn. 346, 45 Am. St. Rep. 468, 57 N. W. 1058.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**KING v. CHICAGO, MILWAUKEE AND ST. PAUL RAIL-
WAY COMPANY.**

[80 Minn. 83, 82 N. W. 1113.]

**ACTIONS—SPLITTING CAUSE OF—INJURY TO PERSON
AND PROPERTY.**—Only one cause of action arises for the sepa-
rate items of damages, in cases where both a person and his prop-
erty are injured by the same tortious act.

Shepherd & Catherwood, for the appellant.

L. French and A. W. Wright, for the respondent.

⁸⁶ LEWIS, J. Plaintiff, while riding in and driving his wagon across defendant's tracks, was run into by defendant's train. As a result, he was personally injured, and the wagon and horses and harness were damaged. Thereafter plaintiff brought an action against defendant to recover for the injuries suffered in his person, and secured a judgment of one thousand dollars. While that action was still pending on appeal in this court (77 Minn. 104, 79 N. W. 611) plaintiff commenced the present proceeding to recover the damage sustained by the injury to the horses, wagon, and harness, alleged to be two hundred and twenty-five dollars. As a defense to this action defendant pleaded the former judgment as a bar, and by an amendment later pleaded its full payment and satisfaction. Upon the trial below judgment was rendered for the full amount, and defendant appeals.

This brings before us a question new to this court, viz., Where the person himself and his personal property are injured by the same tortious act, does there arise only one cause

of action for damages, or is there one separate and independent cause of action for injuries to the person, and another for damages to the property? It has long since become settled in this state that a single, entire cause of action cannot be split up into several suits, and that one recovery, although it be in part recovery for the entire injury, is effectual as an estoppel: *Pierro v. St. Paul etc. Ry. Co.*, 39 Minn. 451, 12 Am. St. Rep. 673, 40 N. W. 520; *Thompson v. Myrick*, 24 Minn. 4; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *O'Brien v. Manwaring*, 79 Minn. 86, 79 Am. St. Rep. 426, 81 N. W. 746. Mr. Dunnell, in his new work on Minnesota Pleading, sections 285, 286, defines a cause of action, and quotes from *Pomeroy on Remedies*: ⁸⁷ "Every remedial right arises out of an antecedent primary right and corresponding duty, and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must, therefore, involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant, springing from this delict; and, finally, the remedy itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong, combined, constitute the cause of action."

The learned trial judge, in a carefully written memorandum, based his decision upon the proposition that at the common law every person was possessed of two distinct primary rights—the right of personal security and the right of private property—and that a distinct cause of action arose from an infringement of either. And, it is argued, these rights have been carried into our system of jurisprudence, and remedies provided for their preservation; that the constitution guarantees a certain remedy by the law for injuries thereto; that statutes have been enacted with the special purpose of keeping these rights separate and distinct, in order that the remedy for an infringement of each may be enforced without reference to the other, as the statute of limitations (*Gen. Stats. 1894, secs. 5136-5138*); also, the statute providing what causes of action survive. Counsel for respondent, taking this distinction of primary rights as a basis, have argued ably that it necessarily follows that the cause of action in this case did not

consist of the act of negligence on the part of defendant in injuring the plaintiff and his property, but the cause of action arose from the results of the act; that instantly upon the striking and throwing of plaintiff by the engine the cause of action arose for injury to his person, and another cause arose as soon as plaintiff's enjoyment of his property was interfered with.

The leading case in favor of respondent's position arose in the English courts: *Brunsdan v. Humphrey*, 14 Q. B. Div. 141. In that case a cabman had been run into by another vehicle, causing ^{ss} injury to the cabman and his cab. The court held that he might maintain two separate actions: "Two separate kinds of injury were in fact inflicted and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action."

But the refined reasoning of this part of the opinion is destroyed by the common-sense, practical argument of Chief Justice Coleridge in a dissenting opinion: "It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights (i. e., his person and his goods), I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers, which contain his leg, and his coat sleeve, which contains his arm, have been torn."

In *Watson v. Texas etc. Ry. Co.*, 8 Tex. Civ. App. 144, 27 S. W. 924, the court held that two causes of action arose where the same act caused the injury to the person and the property, placing the decision on the exception noted in 2 Black on Judgments, section 740, viz., that where there is an infringement of different rights, separate causes of action fol-

low. But the only case cited in the text is the English case above noted. On the other hand, the principle contended for by appellant has been accepted in Massachusetts: *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *Bliss v. New York etc. R. R. Co.*, 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65; also, in New York, in the case of *Reilly v. Sicilian etc. Co.*, 14 N. Y. App. Div. 242; 52 N. Y. Supp. 817.

We are of the opinion that the cause of the action consists of the negligent act which produced the effect, rather than in the effect of ⁸⁰ the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. The natural rights mentioned in the constitution and statutes are of a personal character, all centering in the person; and the enactments referred to are intended to preserve them under the various phases of life, in the most practicable manner, as viewed by the legislature. But because the distinction in reference to personal and property rights has been made, as noticed by respondent, it does not follow that those statutes were intended to definitely provide for separate remedies under the circumstances presented in this case.

Our attention has been called to the case of *Skoglund v. Minneapolis St. Ry. Co.*, 45 Minn. 330, 22 Am. St. Rep. 733, 47 N. W. 1071. We cannot accept the reasoning of the court in that case as applicable to the one before us. The facts were different, and it is not necessary at this time to review it. The rule there applied should certainly not be extended. The views we have adopted seem to us more in harmony with the tendency toward simplicity and directness in the determination of controversial rights. That rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject.

Judgment reversed.

A CAUSE OF ACTION CANNOT BE SPLIT in order that separate suits may be brought for the various parts of what constitutes but one demand. A single tort gives only one cause of action, and the damages resulting from one and the same cause must be assessed and recovered in one suit: *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252, 64 Am. St. Rep. 505, 42 S. W. 649.

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ALBERT LEA v. NIELSEN.

[83 Minn. 101, 82 N. W. 1104.]

EASEMENTS—ARTIFICIAL LAKES.—If the title to the bed of a lake is not originally in the state, the waters thereof do not become public from the fact that the lake is artificially increased under an easement for mill purposes, and incidentally used by the public during the life of the easement for the purposes of hunting, boating, fishing, and similar uses.

WATERS AND WATERCOURSES—ARTIFICIAL LAKES—EASEMENTS.—The grantors of an easement to overflow lands owned by them by the construction of a dam for mill purposes are not estopped from claiming damages from a city, maintaining the dam after its abandonment by the mill owners, by the fact that the public were permitted, without protest, to enjoy, for pleasure purposes, the artificial lake formed by the dam, and the city was permitted to make improvements with reference to it for a period of more than twenty years prior to such abandonment.

WATERS AND WATERCOURSES—ARTIFICIAL LAKE—EASEMENT—ESTOPPEL.—The grantors of an easement to overflow their lands by means of a dam are not estopped from claiming damages from a city maintaining such dam after its abandonment by the grantee of the easement, by the fact that they permit and do not protest against the maintenance of such dam by the city for five years after such abandonment, and that they allow it to erect its waterworks on the bank of the artificial lake formed by such dam.

INJUNCTIONS AGAINST ACTIONS AT LAW.—Several actions at law cannot be restrained by injunction if no general principle is involved conclusive as to all of them, or if the complainant has not already established his right at law.

J. A. Sawyer and J. Anderson, for the appellants.

H. C. Carlson, H. H. Dunn, and C. S. Edwards, for the respondent.

¹⁰³ **LEWIS, J.** Defendants appeal from an order overruling demurrers to plaintiff's complaint.

The facts set forth in the complaint are, in substance, as follows: That the plaintiff is and has been, since 1878, a municipal corporation under the laws of the state; that the several defendants, respectively, claim to be the owners of certain parcels of real estate, which are described as certain portions of surveyed land, each parcel constituting a portion of the bed of Fountain lake; that prior to 1857, a small stream of southern Minnesota, known as "Shell Rock" river, had its source in small natural bodies of water known as "Fountain" and "Pickerel" lakes, and that such river and lakes were to a certain extent navigable, and were used by the public from the earliest settlement of the country for boating, fishing, hunting, and such

uses as are usually incident to such public bodies of water; that in 1857 one George S. Ruble erected a dam at the outlet of Fountain lake, under the provisions of the territorial act approved February 26, 1857, and maintained the same, thereby raising the water of Fountain lake seven and one-half feet above its natural level, until 1867, when the dam was removed by a flood; that in 1867 George S. Ruble and Frances Hall reconstructed the dam under the authority of Special Laws of 1867, chapter 139; that the dam was erected in connection with embankments and a highway bridge, and that such dam, embankments, and bridge have ever since been maintained by said Frances Hall, George S. Ruble, or their grantees, heirs, or assigns, or by the plaintiff, to a height of seven and one-half feet above the ordinary level of Fountain lake; that the right to maintain said dam and flow defendants' land above described was duly and lawfully acquired by said George S. Ruble, his associates, heirs, and assigns, by virtue of the acts of the legislature above mentioned, and under and by virtue of the provisions of General Statutes of 1866, chapter 31, known as the "milldam act," reference being had to the proceedings instituted by Hall and Ruble for such purpose on file in the office of the clerk of the district court of Freeborn county; that in settlement of the legal proceedings thus commenced deeds ¹⁹⁴ of the right of flowage were obtained from the then owners of the land claimed by defendants, and that under such flowage deeds and the provisions of the milldam act Hall and Ruble acquired the right to maintain the dam at a height of seven and one-half feet.

The complaint further states that for more than twenty years prior to the commencement of this action the plaintiff had enjoyed the use of the waters of Fountain lake for fire and other public purposes; that lots and streets have been platted, laid out, and improved with reference to the lake shore as fixed by raising the waters by the dam; that large sums of money were expended by plaintiff in improving a public driveway around the lake, and in maintaining the embankment and dam; that the lake has become a public resort for boating, fishing, skating, etc.; that, as maintained by the dam at seven and one-half feet above the old level, the lake has become a pure and healthful body of water, whereas if the dam were removed, and the lake permitted to recede to its original state, marshy ground would be exposed, which would be a menace to the public health, besides depriving the public of the uses mentioned.

It further appears that in 1889 the mill used in connection with the dam was abandoned, and that since that time plaintiff has maintained the embankment and dam at the same height, and has constructed a system of waterworks at a cost of fifty thousand dollars; that plaintiff was authorized by Special Laws of 1878, chapter 1, as amended by Special Laws of 1889, chapter 10, subchapter 4, section 5, subdivision 50, page 314, to regulate the flowage of the lake; that all of the improvements made by plaintiff were so made relying upon the fact that the lake in its then state was recognized by the public as a permanent body of water, and that the lake as enlarged by the dam was a body of public water, and recognized as such by the legislature in granting the right to Freeborn county to expend certain money for the construction of a bridge over the dam. It is further stated that the defendants knew that the city was, from time to time, expending large sums of money and making such improvements, but that they made no objection, and permitted the same to be done knowing that the public and plaintiff were acquiring valuable and permanent rights thereby; that if the dam were not maintained all of the improvements mentioned ¹⁰⁵ would be rendered useless, and plaintiff and the public be greatly damaged; and that plaintiff has no adequate remedy at law.

It is further alleged that eight of the defendants have commenced separate actions against the plaintiff in the district court of Freeborn county for the recovery of damages by reason of its maintaining the dam, thereby overflowing defendants' premises, and that certain of the defendants are threatening to begin other actions for the like purpose.

The relief demanded by plaintiff is that the several defendants be restrained during the pendency of the action from prosecuting their several actions and for permanent injunction; that the right to maintain the dam at its present height of seven and one-half feet, and the right to overflow so much of defendants' premises as may be thereby affected be declared and decreed to be in the plaintiff. Defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The respondent relies upon the following propositions:

1. That it appears from the complaint that Shell Rock river and Fountain lake were in their original state navigable; that the title to the body of the stream was in the state, and not in defendant; and the fact that the waters have been raised

to their present level by artificial means does not change the original character of the lake. Hence the lake was, as constituted at the time of the commencement of defendants' actions for damages, a public body of water. The cases cited on this point are *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185; *Pawaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436. The Wisconsin cases rest upon the fact that the original purchaser bought with reference to an established line defining what were navigable and public waters, and that the right to raise the water by artificial means had become fixed by prescription. Here, however, it appears from the complaint that the lake never was meandered; that the owners took their land from the government according to the usual subdivisions of survey, without reference to any such lines; and it does not appear that any part of defendants' land was in the bed of the lake as it stood originally. *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, and *Kray v. Muggli*, 77 Minn. 231, 79 N. W. 965, referred to by counsel, have no application here.

2. It is next urged that because appellants stood by and permitted the city to expend money for a number of years in assisting to maintain the dam and bridge across it, and to improve its streets and driveways bordering on the lake in its new condition, for more than twenty years prior to the commencement of the damage actions, they are estopped from asserting any claim for damages. So far as the improvements made prior to the abandonment of the mill are concerned, it is a sufficient answer to state that during the time the easement to flow their lands was in force the defendants had no power to interfere. They had simply granted the right of flowage for mill purposes under the milldam act to Ruble, and if others built and improved relying upon the permanency of Ruble's easement, they cannot complain of the results when that easement came to an end. Nothing is pleaded to show dedication, release, or waiver, only silence. During that time appellants were not only entitled to be silent; they were powerless to prevent the public from enjoying the incidental benefits of the easement of the mill owners to flow the defendants' land for mill purposes.

3. It is further claimed that if the abandonment of the mill in 1889 brought the easement to an end, and the owners of the submerged lands thereby at once acquired the right to remove the dam, then by not doing so, but by permitting it to remain,

and to be taken charge of by the city, which made the extensive improvements mentioned subsequent to 1889, the appellants are estopped from asserting any claim for damages.

Upon the abandonment of the mill the parties to the easement, or their heirs and assigns, were placed in the same position as originally. The city was in the same position with reference to appellants as it would have been had the dam gone out with the flood, as in 1867, and Ruble and Hall abandoned their right to rebuild. The right of flowage would have terminated, and the city would have been compelled to resort to condemnation proceedings in order to acquire that right. It appears from the complaint that at that time plaintiff's charter was amended, giving it the right to control and regulate the flowage of the lake, and in *Boye v. Albert* ¹⁰⁷ Lea, 74 Minn. 230, 76 N. W. 1131, this provision was construed, and it was held that such power was conferred upon the city by that act.

It has been held that where a party stands by and permits extensive improvements to be made affecting his premises he will be estopped from enjoining their continuation. But the appellants do not seek to enjoin the city from maintaining the dam. They merely ask to be compensated in damages, and the facts alleged are not sufficient to bring them within the rule of equitable estoppel as to damages. We are furnished with no citations tending to support this proposition. The actions for damages were commenced about four years after the city assumed control of the dam. There is no admission, express or implied, on the part of appellants that the city had the right to take possession of the dam and maintain it. There is nothing to show that the city acted upon any such admissions of appellants. All of the elements of equitable estoppel are wanting.

4. Should the defendants be enjoined from prosecuting their actions for damages? If it appeared from the complaint that defendants could not recover against the city upon any of the grounds urged by respondent, it would necessarily follow that the same result would be reached in each action, and if that were true there is every reason for bringing the controversy to a speedy end. The same right would be determined in each action, and the whole question could be settled in one. The authorities cited support this view: 1 Pomeroy's Equity Jurisprudence, secs. 243-275. But we find that the complaint does not state facts which relieve the city from responding in damages, and injunction will not lie to restrain actions at law, where

there is involved no general principle or question conclusive as to them all. The mere saving of expense is not sufficient: *Sheldon v. Centre School District*, 25 Conn. 224. A bill of peace enjoining litigation at law is allowable only when the complainant has already established his right at law, or where he claims a general or exclusive right, and several actions would lead to vexatious litigation: *Lehigh etc. R. R. Co. v. McFarlan*, 31 N. J. Eq. 730.

Order reversed.

Lovely, J., took no part.

LAKE.—IF A PERSON ARTIFICIALLY RAISES the level of the waters of a navigable lake, the public rights therein are correspondingly extended so long as such artificial level is maintained; and if it is maintained for a time sufficient to confer title by prescription, during which time the public use and enjoy the lake, the title to his lands thereunder vests in the state by dedication, and he is estopped to revoke such dedication: *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 70 N. W. 436. See, further, *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30, 70 N. W. 1115.

ROSSMAN v. TILLENY.

[80 Minn. 100, 83 N. W. 42.]

JUDGMENTS—RES JUDICATA.—If, in an action to recover the contract price of services rendered, defendant recovers judgment on the ground that the contract has not been completed, such judgment is not a bar to a second action to recover the reasonable value of the same services. To constitute *res judicata*, the former suit must be founded on the same cause of action as the latter.

G. P. Douglas, for the appellant.

C. H. Rossman, pro se.

¹⁶¹ **LEWIS, J.** In the former action between the same parties plaintiff recovered a judgment against defendant for two hundred dollars and seventy-seven cents on his fourth cause of action. The third cause of action in the complaint was for the recovery of two hundred dollars, alleged to be due by agreement for the same services sued on in this action. On the trial of the present action defendant introduced the judgment-roll in the former suit and examined the plaintiff, who testified that at the close of the evidence in the former trial defendant moved for an instruction for a verdict for defendant on the third cause

of action, and that the motion was granted. He also testified that the motion was made on the ground that the evidence showed that he had not completed the contract. This former judgment having been pleaded in the present action in bar, the question comes up for review, the trial court having decided adversely to the defendant.

It appears from the record that plaintiff had been employed to foreclose a certain mortgage for the stipulated attorney fee of two hundred dollars, named in the defeasance; that he had commenced the proceedings, but before completion defendant settled the case, whereupon plaintiff sued, as stated, upon the contract to recover the two hundred dollars. The present action is for the same services, but was tried upon the claim of their reasonable value.

Appellant's position is that the former verdict upon the issue then presented is a bar to this action; that the two remedies—the one on the contract and the other for reasonable value of the services—are essentially one issue; and that, having elected to sue upon the contract in the former suit, and being defeated, he has had his day in court. One decision relied on by appellant is *Thomas v. Joslin*, 36 Minn. 1, 1 Am. St. Rep. 624, 29 N. W. 344. In that case the second action was brought to reform and enforce a contract which, in an imperfect shape, plaintiff had attempted to enforce in the former suit. It was properly held to be one cause of action, and that the plaintiff was estopped, having elected to stand trial in the first action on the incomplete contract. In this case, however, while the subject matter is the same in both actions, the causes of action are different. The parties are the same, the transaction the same, the relief sought the same, but the evidence required is different. ¹⁶³ "The best and most accurate test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the former and the present action": *West v. Hennessey*, 58 Minn. 133, 136, 59 N. W. 984.

In the former action plaintiff was required to prove that the contract existed, and that he had performed it. In the present action he was required to prove what the services were reasonably worth. In the former suit he rested on the contract price, while in the latter he called expert witnesses to show the value of the work actually done. To constitute *res judicata*, the former suit must be founded on the same cause of action: *Linne v. Stout*, 44 Minn. 110, 46 N. W. 319; *State v. Torinus*, 28 Minn. 175, 9 N. W. 725; *Henrietta Bank v. Barrett* (Tex.

Civ. App.), 25 S. W. 456. We have examined all of the assignments of error and points presented by appellant, and do not think it necessary to discuss them.

Order affirmed.

RES JUDICATA, TEST OF.—If the same evidence will not support two causes of action, a judgment upon one will not be conclusive upon the other: *Bell v. Merrifield*, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55. See, too, *Gallagher v. Moundsville*, 34 W. Va. 730, 26 Am. St. Rep. 942, 12 S. E. 859; *Morrison v. Clark*, 89 Me. 103, 56 Am. St. Rep. 395, 35 Atl. 1034. To make out the defense of res judicata, the subject matter of the judgment set up must be the same, and it must be between the same parties or their privies, and the precise point must have been determined: *Maudlin v. City Council*, 53 S. C. 285, 69 Am. St. Rep. 855, 31 S. E. 252.

FERGUS FALLS v. FERGUS FALLS HOTEL COMPANY.

[80 Minn. 165, 83 N. W. 54.]

MUNICIPAL CORPORATIONS—ACTS ULTRA VIRES—ENFORCEMENT OF ILLEGAL LOAN.—If the officers of a city unlawfully loan city funds to a private person and take a mortgage as security therefor, the city is not estopped, although the act is ultra vires, from enforcing collection of the debt by foreclosure of such mortgage.

MUNICIPAL CORPORATIONS—MORTGAGE ULTRA VIRES—PURCHASERS WITH NOTICE.—If the officers of a municipality unlawfully loan city funds to a private person and take a mortgage as security therefor, subsequent purchasers of the mortgaged property, with notice of the mortgage, cannot, in an action by the city to foreclose such mortgage, take advantage of the fact that the act of the city officers was ultra vires.

J. W. Mason and C. C. Houpt, for the appellant.

J. A. Brown, W. L. Parsons, and C. L. Hilton, for the respondent.

¹⁰⁷ **LEWIS, J.** Action by respondent city to foreclose a mortgage upon certain hotel property in the city of Fergus Falls. Defense, that the city cannot maintain an action to enforce securities taken on a loan, the same being void, against public policy, and ultra vires. The action was tried by the court without a jury, and resulted in an order for judgment in favor of respondent. Defendant appeals from an order denying its motion for a new trial.

The trial court found that in 1890 one Bell and wife executed and delivered to the First National Bank of Fergus Falls

their promissory note for ten thousand dollars, due five years from date, with interest at two per cent, and at the same time, to secure the note, executed and delivered a mortgage upon certain premises in Fergus Falls known as the "Grand Hotel property." This mortgage was duly recorded, and contained the usual covenants for foreclosure upon default of payment. The amount of the consideration of the ¹⁰⁰⁰ mortgage—ten thousand dollars—was paid to Bell by certain officers of the city of Fergus Falls out of the city funds as a loan to him from the city. The bank had no interest in the mortgage, but simply held it in trust for the city, and afterward, in 1896, executed and delivered to the city a declaration of trust to that effect. In 1898 the bank duly assigned the mortgage to the city, which assignment was duly recorded. After executing the mortgage, in 1891, Bell and wife deeded the property to one George Dur-ye, and finally the premises were conveyed to defendant in 1892. On the question of notice of the mortgage by defendant when it purchased the property the court found as follows: "That said defendant, the Fergus Falls Hotel Company, at the time of the making and delivery of said last-described deed, and at all times thereafter, had actual notice and knowledge of the existence of said mortgage, and at all times prior to the beginning of this action, in all its dealings with plaintiff in reference thereto, said defendant recognized and admitted said mortgage as a valid and subsisting lien upon the property therein described; that said mortgage was fully considered and taken into account by said defendant in its negotiations for the purchase of said premises and in arriving at the purchase price to be paid therefor."

The court further found that the property was sold for the 1893, 1894, and 1895 taxes, and that respondent was forced to pay eighteen hundred and forty-seven dollars to protect the property from loss under tax judgments; that the taxes of 1897 were not paid, and the property was sold for the same in May, 1899. It is further found that on April 30, 1895, the principal was extended for the period of five years, at request of appellant. The interest was paid by appellant up to September 23, 1896. As conclusions of law: That defendant was indebted to the plaintiff in the full amount of the principal, interest, and taxes paid, and that the property be sold to satisfy the same.

1 Special Laws of 1883, chapter 1, subchapter 5, section 31, provides: "No money shall be paid out of the city treasury, ex-

cept for principal or interest on bonds, unless such payment shall be authorized by a vote of the city council, and shall then be drawn out only upon orders signed by the mayor and countersigned by the city clerk, which orders shall specify the purpose for which they were drawn, and the fund out of which they are payable, and the name of the ^{1st} person in whose favor they may be drawn, and may be made payable to the order of such person."

The order upon which the city treasurer paid out the money (Exhibit 5) is as follows:

"Fergus Falls, Minn., Sept. 23, 1890.

"Please pay to C. D. Wright ten thousand dollars out of the permanent improvement fund belonging to the city of Fergus Falls.

E. SHAVER,

"Acting Mayor.

"WM. HOEFLING,

"Clerk pro tem.

"To F. J. Evans, City Treasurer. \$10,000."

Defendant objected to the introduction of this order in evidence upon the ground that it was void on its face, not showing the purpose for which the order was drawn. The objection was overruled, and the order received. This ruling is assigned as error.

Counsel for the appellant take the position that the order was void for the reason assigned; that it would afford the city treasurer no protection if he paid out the city's money on such an order, and for that reason the city cannot predicate any rights upon it. Admitting that the officials of the city council issued a void order, and would be liable for so doing, and that the city treasurer paid out the money without authority, and that the order would not protect him, this only goes to show that the money was obtained from the city by an indirect and illegal manner, through the acts of its officers. The main issue to be determined in this case was whether the city had loaned the money, and could call into action the powers of the courts to enforce the collection of the debt. It is immaterial whether the money was obtained upon an order void upon its face or regular upon its face. Neither is it material whether the officers were acting in good faith, as, no doubt, they were. The only purpose of introducing the order was to show that the money was paid out of the city treasury, and it was properly received.

2. Appellant claims that there was no evidence to justify the finding that the city ever loaned the money to Bell, conceding that he received the benefit of it. The argument is based upon two propositions: 1. That the order being void, the city treasurer had no right to pay it, and charge the amount to the city. The act ¹⁷⁰ being void, no money of the city passed. 2. That the money coming to the treasurer was deposited in the bank in open account, subject to the treasurer's check; that the city had no money on deposit, but had parted with its title to the bank, upon the theory that the bank acquired title to the money deposited on open account. This may be technically true as a result of the method of bookkeeping; nevertheless, by means of the order, and a check drawn on the city funds in the bank, ten thousand dollars of the city's money was drawn out and paid over to the use of Bell. This was the ultimate fact found by the court, and the evidence is conclusive.

3. Again, it is urged that the city, having no power to make the loan, cannot invoke the powers of the courts in collecting it.

The city certainly had no authority to loan this money. The act was not within its charter powers; but it does not follow that the city cannot recover it. It is true that the doctrine of ultra vires is, and ought to be, rigidly enforced in favor of a municipal corporation in order to protect its taxpayers from being plundered by the unlawful acts of its officers. But when, as in this case, a municipal corporation is seeking to have restored to its treasury money taken therefrom under color of an ultra vires contract, it does not lie in the mouth of the beneficiary of the wrongful act or of his assignee with notice to say that a lien securing the payment or return of the money is void because the money was obtained by virtue of a void contract; otherwise, the wrongdoer would be permitted to take advantage of his own wrong to the injury of innocent taxpayers. There can be no question about the city's power to collect from Bell if he were alive and solvent, under the decision in *Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737, and there is no distinction in principle between that case and this. That decision rests upon the theory that the contract on the part of the city by which it paid five hundred dollars for the establishment of a shoe factory was void, being beyond its powers. The corporation, as such, had no power to make it, and its officers had no power to bind it. The money having been paid without authority, its payment was not a corporate act, and the corporation could recover the money. The principle applied in that

case is not changed by the effect of Penal Code, sections 136, 369, 370: Gen. Stats. 1894, secs. 6421, 6663, 6664. ¹⁷¹ Those sections apply to public officers, but can have no application to the city as such.

The general rule that the law leaves the parties to an illegal transaction where it finds them has no application. The officers of the city are not the city. The city cannot be bound by the unlawful acts of its officers in paying out its money. And if the city may recover the money from those who receive it, why may it not foreclose the mortgage, it being impossible to secure the money, or any part of it, in any other way? There is no difference in principle between the two remedies. The city is only recovering what it can of the funds illegally taken from its treasury. The defendant cannot complain. It bought the property with notice of the city's claim and lien. It is in no worse position than if the loan had been made by a private party. And it would be inequitable to permit it to benefit by the illegal act of the city officials under such circumstances. This right of a municipal corporation to enforce its claims under such circumstances has been recognized or applied in the following cases: *Deering v. Peterson*, 75 Minn. 118, 77 N. W. 568; *National Bank v. Matthews*, 98 U. S. 621; *Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7; *Hay v. Alexandria etc. R. Co.*, 20 Fed. 15.

Order affirmed.

Lovely, J., absent, took no part.

MR. JUSTICE BROWN, DISSENTING, said: "The real question in the case is whether municipal corporations of this state can engage in the loaning business, and as this question is answered so should the case be decided. It is generally understood that such corporations are limited and restricted in their contracts and dealings to matters essential to the good order and government of the municipality and the comfort and welfare of the inhabitants. Contracts with individuals in the interests of private affairs are beyond their authority and void. This rule is one universally recognized and applied. That the contract involved in this case was one with an individual, and in the interest of private affairs, is not disputed. That the loan of public funds to further and promote private objects and interests is against the best interests of the municipality whose funds are so loaned, and against public policy, cannot for a moment be doubted. That such a transaction is not only beyond the legitimate authority and power of the municipality, and, in this state, a palpable violation of positive law, cannot be denied. Yet this court solemnly declares the same a valid

and enforceable contract and transaction. The rigor of the old rule of ultra vires has been much relaxed of late years, especially as to private corporations, and the doctrine of estoppel is now often applied to the end that justice may be done. As to contracts merely ultra vires—that is, contracts not within the express or implied delegated authority of the corporation—the doctrine of estoppel is applied to prevent a party who has received the benefit of a part performance from setting up want of authority in the corporation as a defense to a performance on his part. And perhaps this doctrine has been applied in some cases for a like purpose where the contract is not only ultra vires, but illegal, because prohibited by law. But the great preponderance of the authorities hold the illegal contract wholly void and incapable of ratification: 1 Beach on Public Corporations, secs. 217, 218, 248; *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. Rep. 361; *Smith v. Newburgh*, 77 N. Y. 180; *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 141; *Lewis v. Shreveport*, 108 U. S. 282, 2 Sup. Ct. Rep. 634; *Board v. Arrighi*, 54 Miss. 668; *Oregonian Ry. Co. v. Oregon Ry. etc. Co.*, 10 Saw. 464, 22 Fed. 245, 23 Fed. 232. Such contracts are on a par with illegal contracts between individuals, and possess no greater virtue because made by a corporation. And the rule is, as I understand it, that whether partly performed or not, they are utterly void, and cannot be enforced: See authorities supra, and 1 Beach on Public Corporations, sec. 217 et seq.; *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442, 16 Pac. 7; *Riche v. Ashbury*, L. R. 9 Ex. 224-262. The right of the city of Fergus Falls to collect and expend public money is limited by the act of the legislature creating it to public purposes, and a diversion of such funds to a private purpose is not only beyond its delegated authority, but palpably against public policy, and should for this reason, if no other, be held void. But such diversion of public funds is expressly made a felony by section 369 of our Penal Code: Minn. Gen. Stats. 1894, sec. 6063; and this renders the transaction wholly illegal, irrespective of other considerations. But my brethren say that the city is not responsible for the unlawful acts of its officers. This may be, and doubtless is, true, as a general proposition of law, but cannot be true when applied to a city attempting to enforce a contract which is the result and grows out of such unlawful conduct. If a city departs from its true character, and enters into competition with money lenders, it must submit to the law applicable to the business thus engaged in. It is elementary that a principal cannot adopt or ratify a contract made by his agent in violation of his authority in part and reject it in part. If the principal ratify such a contract, he must take it clothed with such virtues and benefits as it is possessed of, and burdened with such inequities and illegal features as the transaction giving it existence surrounds it: 1 Am. & Eng. Ency. of Law, 1192, and cases cited; *Newberry v. Fox*, 37 Minn. 141, 143, 5 Am. St. Rep. 830, 33 N. W. 333. . . . The law

of ultra vires as applied to contracts merely in excess of corporate power is not the law by which this case should be judged. We have the additional element of illegality, and the law with respect to illegal contracts should control—namely, that an action in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, can in no case be maintained, but when the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he has derived from an unlawful act, then it is consonant to the spirit and object of the law that the plaintiff should recover. This rule applies to this case, because the transaction here in question is not only illegal as against public policy, but illegal because a violation of law: See *State v. Torinus*, 24 Minn. 332; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299. In *Henderson v. Sibley*, 28 Minn. 515, 11 N. W. 91, and *Chaska v. Hedman*, 53 Minn. 525, 53 N. W. 737, the unlawful contract and illegal acts of the public officers were repudiated, and the action was to recover the money unlawfully taken from the treasury. The same remedy should have been resorted to by the plaintiff, instead of attempting to ratify and confirm the illegal conduct of its officers. . . . The transaction involved in this case was void ab initio, because of its illegality, and I submit that life could not be infused into it by even a most vigorous application of the doctrine of estoppel: 1 Am. & Eng. Ency. of Law, 1182 et seq.; *Montgomery v. Montgomery etc. Co.*, 31 Ala. 76.

"Defendant is not estopped from denying the validity of the mortgage merely because it has succeeded to the title to the property: *Calkins v. Copley*, 20 Minn. 471, 13 N. W. 904; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91. *Farmer v. St. Paul*, 65 Minn. 176, 67 N. W. 990, and *Deering v. Peterson*, 75 Minn. 118, 77 N. W. 568, are not in point. For these reasons, I think the order appealed from should be reversed and a new trial granted. If this decision be followed in the future, cities, towns, and villages in this state may understand that it is lawful to appropriate funds from the public treasury for investment in boot and shoe factories, brick-yards, and hotels and lunch counters."

MUNICIPAL CORPORATION—ULTRA VIRES.—A party contracting with a city under a contract ultra vires, but not prohibited, is estopped, when sued upon the contract, from setting up the plea of ultra vires to escape liability and to enable him to retain benefits received under the contract: *St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. Rep. 764, 14 S. W. 825. But see *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 23; *Nashville v. Sutherland*, 92 Tenn. 335, 36 Am. St. Rep. 88, 21 S. W. 674.

CUNNINGHAM v. CUNNINGHAM.

[80 Minn. 180, 83 N. W. 58.]

WILLS—ATTESTATION—PRESENCE OF TESTATOR.—

If, after a testator has signed an instrument intended to be his last will, it is taken by two persons who are present at his request as subscribing witnesses, and they sign the instrument at a table in an adjoining room, a few feet distant, and within easy sound of the testator's voice, but a few feet out of the range of his vision, after which the attesting witnesses immediately return to him and show him their signatures, whereupon he takes the will, looks it over, and pronounces it satisfactory and "all right," this is a sufficient attestation of the will within a statute requiring such attestation to be in the "presence" of the testator. The fact that the will is thus attested a few feet out of the range of the vision of the testator does not vitiate it, especially when the testator could have seen the attesting witnesses sign by taking a few steps, which he was able to do.

WILLS—ATTESTATION—PRESENCE OF TESTATOR.—

In the definition of the phrase "in the presence of the testator," as applied to subscribing witnesses to wills, due regard must be had to the circumstances of each particular case, as the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him, and if the witnesses sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence.

T. Fraser and G. W. Somerville, for the appellants.

C. W. Willson, for the respondents.

¹⁸³ COLLINS, J. General Statutes of 1894, section 4426, provides: "No will, except such nuncupative wills as are hereinafter mentioned, shall be effectual to pass any estate, real or personal, or to change or in any way affect the same, unless it is in writing, and signed at the end thereof by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses."

¹⁸³ And the only question in issue on this appeal is whether the alleged will was attested and subscribed in the presence of the testator, Cunningham, by the two persons whose names were attached as witnesses.

The testator had been confined to his room for some time. It was a small bedroom with a doorway which led into a large room upon the north, the head of his bed being near the partition between the two. There was no door, but a curtain had been hung in the doorway, which was drawn to the west side at the time in question. Three days before the signing the

testator sent for his attending physician, Dr. Adams, to come to his house, and draw his will. At the same time he sent for Dr. Dugan to be present as a witness. The draft of a will made by Dr. Adams as dictated by Cunningham was unsatisfactory, and both of the physicians went away. They were again summoned November 12, 1898, and went to the house in the forenoon. Dr. Adams drew a new will as instructed by Cunningham, the latter remaining in his bed. When the document was fully written, both men stepped to the bedside, and Dr. Adams read it to the sick man. Having heard it read through, Cunningham pronounced it satisfactory, and then signed it. When so signing he sat on the edge of the bed, and used as a place for the paper a large book which was lying upon a chair. Drs. Adams and Dugan were then requested to sign as witnesses. For this purpose they stepped to a table in the sitting-room, which stood about ten feet from where Cunningham sat, and there affixed their signatures. The time occupied in so signing did not exceed two minutes, and immediately thereafter Dr. Adams returned to the bedside with the paper. Dr. Dugan stepped to the doorway, about three feet from Cunningham, and then Adams showed the signatures of the witnesses to him as he sat on the edge of the bed. Cunningham took the paper, looked it over, and said in effect that it was all right. From where he sat he could not see the table which was used by the witnesses when signing. He could have seen it by moving two or three feet. While they were signing he leaned forward, and inquired if the instrument needed a revenue stamp, to which Dr. Adams replied that he did not know, the reply being audible to Cunningham.

184 These are the salient and controlling facts found by the court below, on which it based an ultimate finding that the instrument so witnessed was attested and subscribed in the presence of the testator, and then affirmed the order of the probate court admitting it to probate as the last will and testament of the deceased.

The appellants (contestants below) insist that the attestation and subscription by the witnesses was insufficient, because Mr. Cunningham did not, and could not, see the witnesses subscribe their names from where he sat, and their contention has an abundance of authority in support of it from jurisdictions in which statutes copied from the English law on the subject, and exactly like our own, are in force. The rule laid down in these authorities is that the attesting and subscribing by the witnesses

must take place within the testator's range of vision, so that he may see the act of subscribing, if he wishes, without a material change of his position; and that he must be mentally observant of the act while in progress. Lord Ellenborough thus stated it in *Doe v. Manifold*, 1 Maule & S. 294: "In favor of attestation it is presumed that if the testator might see, he did see. But I am afraid that if we get beyond the rule which requires that the witness should be actually within the reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence."

Construing the same words in the Illinois statute, it was recently said: "This act of attestation consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature was made or acknowledged in their presence. It is this act of attestation, by subscribing their names to the will as witnesses thereto, which the statute requires to be in the presence of the testator. The object of the law, as frequently declared, is to prevent fraud or imposition upon the testator, or the substitution of a surreptitious will, and to effectuate that object it is necessary that the testator shall be able to see and know that the witnesses subscribe their names to the paper which he has executed or acknowledged as his will. The purpose of the statute is not attained by mere ability to see the witnesses or some part of them, but the ¹⁸⁵ act of attestation is the thing which must be in the presence of the testator. . . . It would not be an attestation in the presence of the testator if he could not see the act of attestation, but merely understood from the surrounding circumstances that the act was taking place": *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368.

In brief, the courts have, almost without exception, construed a statute requiring an attestation of a will to be in the "presence" of the testator to mean that there must not only be a consciousness on the part of the latter as to the act of the witnesses while it is being performed, but a contiguity of persons, with an opportunity for the testator to see the actual subscribing of the names of the witnesses, if he chooses, without any material change of position on his part. And yet an examination of the decided cases wherein the ever-varying circumstances and conditions have been considered, and this rule applied, will convince the reader that the task of application has not been an easy

one, and has led to surprising results at times. Some years ago a large number of American and English cases were collected in a note appended to *Manderville v. Parker*, 31 N. J. Eq. 242, and an examination thereof will show the absurd and inconsistent positions in which the courts have frequently placed themselves.

As will be seen from the facts surrounding the cases mentioned in this note, or cited in the text-books in support of this rule, it has been held almost universally that an attestation in the same room with the testator is good, without regard to intervening objects which might or did intercept the view; and also that an attestation outside the room or place where the testator sat or lay is valid if actually within his range of vision. And no court seems to have doubted that a man unable to see at all could properly make a will under the statute, if the witnesses attested within his "conscious" presence, whatever that means. Exactly why or how an exception in the case of one temporarily or permanently blind can be injected into this statute has not been attempted by any court or writer, so far as we know. Nor has there been any success in the effort to show why one kind of an intervening object—a partition wall, for instance—is better calculated to afford an opportunity for the perpetration of a fraud upon the testator than is another kind, say, the ¹⁸⁶ closed curtains of an old-fashioned bed, or the head or foot board of a bedstead, or any other article of furniture which happens to be an obstruction to the sight. Again, it is difficult to see what sound distinction can be made, when applying the rule, between a case where the testator can see the witnesses attest, if he chooses to lean his body forward a few inches and the case where the act can be seen if he steps forward the same distance. Or, take a case where a testator has been injured, and is compelled to lie on his back with his eyes fixed on the ceiling. Must the witnesses affix their signatures from an elevation in order to sign in his presence? No case has gone that far, and yet what difference would it make with such a testator in fact or in sound reason if the will was attested ten feet distant, on a table in an adjoining room, or on a table the same distance from the bed, but in the same room?

Take the case at bar. The testator sat on the edge of his bed when the witnesses signed at the table in the adjoining room, a few feet distant, and within easy sound of his voice. If he could have seen them by leaning forward, the authorities in favor of upholding the will are abundant. Physically, he was ca-

pable of stepping two or three feet forward, and from this point the witnesses would have been within his range of vision. It is extremely difficult to distinguish between the two cases, and yet it has been done again and again in applying the rule.

We might continue these suggestions and queries, as has been done quite frequently by courts which have not been entirely satisfied with a very rigid construction of the statute, and have not hesitated to say so; but it seems unnecessary, for there is one feature in these findings of fact which is sufficient, in our judgment, to warrant an affirmance, although there are many decisions to the contrary. As before stated, the court found that the witnessing of the will consumed not more than two minutes, and that immediately thereafter Dr. Adams returned to the testator, while Dr. Dugan came to the doorway, not over five feet distant, whereupon the former "showed the signatures of the witnesses to the testator. The latter took the will, looked it over, and said, in effect, that it was all right." To say that this was not a sufficient attestation within a statute which requires such attestation to be in the "presence" ¹⁸⁷ of the testator, simply because the witnesses actually signed a few feet out of the range of his vision, is to be extremely technical without the slightest reason for being so. The signing was within the sound of the testator's voice; he knew what was being done; the act occupied not more than two minutes; the witnesses returned at once to the testator; their signatures were pointed out to him; he took the instrument into his own hands, looked it over, and pronounced it satisfactory. The whole affair, from the time he signed the will himself down to and including his expression of approval, was a single and entire transaction; and no narrow construction of this statute, even if it has met the approval of the courts, should be allowed to stand in the way of right and justice, or be permitted to defeat a testator's disposition of his own property. In *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, it was said, at page 590 (81 Michigan): "In the definition of the phrase 'in the presence of,' due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If, as before shown, they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence."

But, as was said in substance in the same case, we agree that this will was validly executed expressly on the ground that the whole transaction was an entirety in fact, and that immediately after the witnesses had attested the instrument was returned by them to the hands of the testator, his attention was called to their signatures, and he expressed his satisfaction and approval of what had been done. This view, which does no violence to the spirit and intent of the statute, is not without precedent and authority aside from the Michigan case, although it may, as said by the court below, run contrary to a majority of the decisions: See *Sturdivant v. Birchett*, 10 Gratt. 67; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464.

Judgment affirmed.

A WILL IS SIGNED IN THE TESTATOR'S PRESENCE, in legal contemplation, when it is signed by the witness at a table in one room while the testator is in bed in an adjoining room, where the table is directly in front of the door, so that the testator can see the witness sign if he looks, and the witness can also see the testator: *Hopkins v. Wheeler*, 21 R. I. 533, 79 Am. St. Rep. 819, 45 Atl. 551. But a will is not attested in the presence of the testator if the witnesses are out of his sight, and he cannot readily change his position. The test is, not whether he saw them sign, but whether, considering his mental condition and his posture at the time, he might have seen them do so: *Witt v. Gardiner*, 158 Ill. 176, 40 Am. St. Rep. 150, 41 N. E. 781. See, also, *Burney v. Allen*, 125 N. C. 314, 74 Am. St. Rep. 637, 34 S. E. 500.

SPERRY v. FLYGARE.

[80 Minn. 325, 88 N. W. 177.]

CONSTITUTIONAL LAW—RURAL HIGHWAY—LOCAL IMPROVEMENT—TAXATION.—A rural highway is not a "local improvement" within the meaning of a constitutional provision exempting from equality of taxation provision assessments for local improvements by municipal corporations. Hence, a statute providing that owners of land within one mile of a rural highway laid out thereunder shall pay the cost and expense thereof is unconstitutional and void. Such highway must be laid out, established, and improved at the expense of the public at large.

S. Porter, D. Fish, and E. Torrance, for the appellants.

Brown, Reed, Merrill & Buffington, Olson & Johnson, and A. B. Choate, for the respondent.

³²⁶ BROWN, J. This is an action to restrain and enjoin the defendants, board of county commissioners and auditor of

Kandiyohi county, from issuing and negotiating the bonds of the county under and pursuant to Laws of 1895, chapter 302, to pay the cost and expense of locating and establishing a public highway under the terms of such law. Defendants demurred to the complaint, and appealed from an order overruling the same.

The act under which defendants are threatening to proceed, and which fully warrants the threatened action if valid and constitutional, is an evident attempt on the part of the legislature to extend the law of assessments for local improvements heretofore, with respect to streets and the improvement thereof, confined exclusively to municipal corporations proper, to rural roads and highways to be laid out by county commissioners. Just why the legislature should deem it wise and prudent to do so is not clear. It is quite well known that assessments for the improvement of streets and sidewalks in our larger cities have proven exceedingly burdensome to property owners, and in some instances reached a point wellnigh to confiscation. Property owners of moderate means have been compelled to abandon their property, or sacrifice it by sale for much less than its actual value to avoid total loss. Owners of agricultural lands have hardships quite heavy enough to bear, and if any reasons exist for thrusting upon them the additional burdens incident to the "local improvement" system of taxation, as practiced and enforced in cities, they are not apparent to the casual observer.

Taxation according to benefits as applied to improvements in the ³²⁷ streets of a city is very different when applied to a country highway. In the city the improvement will benefit and improve the property adjacent to, and abutting upon, the improved street, but will not benefit property remote therefrom, while in the country districts the highway is an advantage to the public at large, and the benefit thereof is not confined to farms through which it may pass. It is therefore reasonable to require the benefited city property to pay the expense of the improvement, while it would not be reasonable or just or fair to require the farms along the line of a country road to pay the entire cost and expense of opening and laying the same out. In a case in Pennsylvania where there was a similar attempt to extend this system into the country districts the supreme court said: "To apply it [that is, taxation according to benefits] to the country and to farm lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursu-

ance of law; so that at the very first blush everyone would pronounce it to be palpably unreasonable and unjust. . . . Whether we view this avenue as a macadamized highway, seven miles long or three hundred, the result is the same to those along its route. To charge its cost upon the farms lying within one mile on each side at a fixed sum per acre is so obviously erroneous and unreasonable, and leads to such a destruction of private right, and such unfairness of imposition for the advantage of the public at large, and of individuals who pay nothing, it cannot, on any fair principle of reasoning, be said to be a valuation according to benefits": *Washington Avenue Case*, 69 Pa. St. 352, 8 Am. Rep. 255. Such a law was declared invalid in *Kentucky: Graham v. Conger*, 85 Ky. 582, 4 S. W. 327.

The act under consideration authorizes the county commissioners of each county in the state to lay out and establish county roads and highways, and to charge and assess the cost and expense thereof to all lands lying within one mile of the highway, with certain exceptions, according to benefits received. Such assessments are not limited to the amount of benefits received, but the lands are made to pay the entire cost of the road, whether such cost exceed the benefits or not. But one question was argued in this court, and that with reference to the constitutionality of the ³²⁸ act. It is assailed in several particulars, but as we deem and hold it unconstitutional on the ground that the highways thereby authorized to be laid out are not "local improvements," within the meaning of section 1 of article 9 of the constitution of the state, our consideration of the act will be confined to that question.

As originally adopted, the constitution required all taxes to be as "nearly equal as may be," and while in this form it was held to prohibit special or local assessments for public purposes based on benefits: *Stinson v. Smith*, 8 Minn. 326 (366); *Bidwell v. Coleman*, 11 Minn. 45 (78); *Comer v. Folsom*, 13 Minn. 205 (219). To obviate the effect of these decisions, and in the interests of local improvements of a public nature, but so specially beneficial to private interests as to make it unjust to resort to the public treasury to pay therefor, the constitution was amended in 1869, by exempting from this equality provision assessments for local improvements by municipal corporations. So that unless the laying out of a rural highway is a "local improvement," within the meaning of the amended constitution, the act in question is invalid, as a violation of the requirement that all taxes be equal, within the above decisions. The term

"local improvements" was defined by this court in *Rogers v. St. Paul*, 22 Minn. 494, 507, as follows: "By common usage, especially as evidenced by the practice of courts and text-writers, the term 'local improvements' is employed as signifying improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefited. . . . An examination of these authorities will also show that the term 'local improvements,' or terms synonymous, are more commonly applied to the grading, curbing, and paving of streets than to any other class of improvements. Our constitution is to be presumed to have employed the term 'local improvements' in a sense which is thus attributed to it by common usage."

Prior to and ever since the adoption of the constitutional amendment roads and highways in the country districts were and have been laid out, established, and improved at the expense of the public at large. Damages for laying out such roads have been paid from the public treasury, and at no time have farm lands been assessed therefor any further than, in assessing damages, benefits to the land through which the highway passes have been deducted ~~329~~ from the amount awarded to the land owner. But benefits accruing to the public generally have never been considered or allowed in reduction of individual damages. Until the passage of this act a rural highway was not understood to come within the meaning or to constitute a local improvement, and if sustained it will completely change the method heretofore in existence and employed for laying out and establishing such road. The term "local improvements" has been most generally used and employed in reference to improvements by municipal corporations proper, rather than to counties and towns, which are only quasi municipal corporations: 1 *Dillon on Municipal Corporations*, sec. 22. And such has been the direction of legislation.

With respect to the construction of ditches for draining wet and swampy lands in the interests of the public welfare, and assessing the expense thereof to the lands benefited, a county has been held to be a municipal corporation, and such ditches local improvements, within the meaning of the constitution: *Dowlan v. County of Sibley*, 36 Minn. 430, 31 N. W. 517. But that decision can have no controlling force or effect with reference to the question here in hand. The construction of ditches for the purposes just stated operates peculiarly to the benefit of the lands adjacent to the ditch. Such lands are thereby reclaimed, and made suitable and fit for agricultural purposes, and it is

proper and just that the lands so specially benefited and improved should pay the cost and expense incident to the improvement. This is true also with respect to the improvement of public streets of a municipal corporation proper, such as paving, construction of sewers, and laying sidewalks, all resulting in and constituting a special benefit to the property adjacent to, and abutting upon, the improved street. But not so with reference to farm lands adjoining a public road. Such road is not a special benefit to the farm, or the owner thereof, independent of, and unconnected with, the public benefit. It might be such a benefit if in its construction and improvement it drained wet and swampy portions of the land or improved the same in some other special way. But such highways are not ordinarily beneficial in those respects. In speaking on the subject of local ³³⁰ improvements in the case of *State v. Reis*, 38 Minn. 371, 373, 38 N. W. 97, Mitchell, J., said: "It is not the agency used or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally. . . . This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellence enhanced, or the like'; or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.'"

A rural highway does not come within this definition. Such a "road is devoted to the public use. It is a highway in which the entire public is interested, and where the owners of adjacent land, although not touching the road, are equally benefited with those living upon it": *Graham v. Conger*, 85 Ky. 582, 4 S. W. 327. A highway extending through a county is not ordinarily of any greater benefit to lands through which it passes than to lands farther removed therefrom. And if this act be upheld, the burden of laying out and establishing country roads will hereafter be borne by the few for the benefit of the public generally. A construction of our law that would work such an injustice should not be adopted.

The legislature may, no doubt, create and establish taxing districts, and provide for the taxation of lands therein for public improvements necessary to, and in the interests of, the district, but such was not the object or purpose of this act. The plain object of it was, as expressed by the learned judge below in his order overruling the demurrer, an attempt on the part of the legislature to "stamp all rural highways as local improvements." It provides that owners of land within one mile of the highway laid out thereunder shall pay the cost and expense thereof. It creates no district for taxing or other purposes, but simply selects a few land owners to discharge a burden that should be assumed by all, or at least by those who are equally benefited by the improvement. ³³¹ The question as to the power and authority of the legislature in establishing taxing districts for the purposes of public improvements is not, therefore, before us. The act cannot be sustained on the district theory. In view of all these considerations, we are constrained to hold that a rural highway is not a "local improvement" within the meaning of the constitution, and that the act in question is invalid.

We have examined and considered the suggestions of counsel for appellant that the act may be sustained with the assessment feature eliminated, but we cannot see our way clear to so hold. We are not prepared to say that with such feature stricken therefrom the legislature would have passed the act. Indeed, without it the act is shorn of its principal feature, and its whole purpose is gone.

Our conclusion is in accord with that reached by the learned judge of the court below, and his order in the premises is affirmed.

HIGHWAY ASSESSMENTS.—THE LEGISLATURE has no authority to compel the owners of farm lands, lying within one mile on each side of a public highway, to pay for grading, macadamizing, and improving it, by an assessment upon their lands by the acre: *In re Washington Avenue*, 60 Pa. St. 352, 8 Am. Rep. 255. And a statute that requires all expenses incurred in making a sewer in a public highway to be assessed to each parcel in proportion to the number of lineal feet it measures on the highway is unconstitutional: *Dexter v. Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; but see, contra, *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep., and cases in 181 U. S. 324, 371, 389, 394, 396, 399, 402.

CROSS v. WHITE.

[80 Minn. 413, 83 N. W. 393.]

JUDGMENTS—RES JUDICATA—SURETIES.—A determination of the probate court as to the amount due from a guardian to his ward, made after due notice to such guardian, is final and conclusive against the sureties on the guardian's bond in an action thereon.

J. L. Washburn and D. W. Bailey, for the appellants.

Schmidt, Reynolds & Mitchell, for the respondent.

⁴¹³ **BROWN, J.** Appeal by defendants from an order denying their motion for a new trial. The facts are short. On January 15, 1894, defendant White was duly appointed guardian of the estate and property of plaintiff, who was then a minor, and thereafter duly qualified as such, and entered upon the discharge of his duties. To secure the faithful discharge of his duty, he duly executed to the probate court of St. Louis county the usual bond, which the defendants Norris and McDonnell signed and executed as sureties. The bond is in the usual form of such instruments and is similar to that construed in the case of *Jacobson v. Anderson*, 72 Minn. 426, 75 N. W. 607. As such guardian, said White received large sums of money, which he invested for his ward in real estate mortgages. It appears from the record, though it is not important, that by reason of the depreciation of real estate values White was unable to realize from ⁴¹⁴ his investments sufficient to discharge his indebtedness to the ward, and neglected to do so. On March 20, 1899, he was duly cited by the probate court, and required to make an accounting as such guardian, and to pay over to plaintiff, his ward, all money due him. He appeared before said probate court in response to such citation, and duly filed his account. After due hearing in the matter, the probate court duly adjudged and determined that White was indebted to plaintiff, his said ward, in the sum of five thousand eight hundred and sixty-two dollars and twenty-one cents, and ordered and required that he pay the same to plaintiff. This he failed to do, and plaintiff, who has arrived at majority, brought this action upon said bond, and against defendants Norris and McDonnell as sureties thereon.

The only question in the case is whether the order and determination of the probate court is final and conclusive against the sureties on the guardian's bond. The question came before

this court in *Jacobson v. Anderson*, 72 Minn. 426, 76 N. W. 607, and such determination was there held conclusive. The decision is in line with the trend of authorities generally, and no reason occurs to us why we should depart from it. A distinction is made by the authorities between bonds given by sheriffs and those given by guardians and administrators: *Brandt on Suretyship and Guaranty*, secs. 530-533; *Beauchaine v. McKinnon*, 55 Minn. 318, 43 Am. St. Rep. 506, 56 N. W. 1065. The other questions argued by counsel are not within any issue raised by the pleadings, and cannot be considered.

Order affirmed.

GUARDIAN.—A JUDGMENT AGAINST a guardian is conclusive against his sureties: *Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563. Whatever binds and concludes him equally binds and concludes them: *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 860.

STATE v. SHEROD. STATE v. HORRIGAN. STATE v. O'GRADY.

[89 Minn. 446, 83 N. W. 417.]

CONSTITUTIONAL LAW—LABEL GIVING INGREDIENTS OF COMPOUND.—A statute requiring all manufacturers and sellers of baking-powder to affix a label to every box or can containing the name and residence of the manufacturer, and the words "This baking-powder is composed of the following ingredients, and none other," naming them, is a valid exercise of the police power of the state, and not unconstitutional as an infringement upon private rights, nor as class legislation.

S. C. Olmstead and Minn & Thygeson, for the appellants.

W. B. Douglas, attorney general, H. E. Bigelow, county attorney, and F. W. Zollman, assistant county attorney, for the respondent.

⁴⁴⁷ **LEWIS, J.** These three cases were submitted together, and may be so disposed of. The only question involved is the constitutionality of the baking-powder law: Laws 1899, c. 245. This statute requires all manufacturers and sellers of all compounds or mixtures intended for use as a baking-powder to affix a label to every box or can, containing the name and residence of the manufacturer, and the words, "This baking-powder is composed of the following ingredients and none other," fol-

lowed by the names of the ingredients. This chapter is an amendment to Laws of 1889, chapter 7, which required such a label to be put upon boxes and cans containing alum, in any form and shape, as a constituent. The effect of the amendment of 1899 was to require the label to be placed upon all baking-powders, regardless of whether they contained alum or any deleterious substance or were pure and healthful. The several defendants were convicted in the municipal court of St. Paul of selling baking-powder without placing thereon the required label, and they appeal from judgments entered in such proceedings.

In the case against O'Grady we are asked to pass upon the law, conceding, under stipulation, that the baking-powder sold was a pure cream of tartar powder and not injurious to the public health, whereas in the other cases the state took the position, and introduced evidence to the effect, that the cream of tartar powders were not pure and healthful, and that the law should be sustained on that ground. The amendment of 1899 having wiped out all distinction between the various kinds of powders, and requiring the label as to the ingredients, without regard to purity or healthfulness, the constitutionality of the law does not depend upon the nature of the ingredients of the powders sold by defendants Sherod and Horrigan, and we will not consider the evidence in that respect. If the ⁴⁴⁸law cannot be sustained upon the broad ground that it is a proper exercise of the police power of the state, without regard to the purity and healthfulness of any particular powder, then it cannot be sustained with reference to powders which are impure and harmful in their use. The law is attacked upon the usual grounds urged in such cases, viz., that it is not a proper exercise of the police power of the state, and is in violation of article 1, section 2, and article 4, sections 33, 34, of the state constitution.

Appellants advance the argument that if the baking-powders are pure cream of tartar powders, there is no reason requiring their ingredients to be published, and it is an unwarranted interference with a manufacturer's or dealer's business to put him to that expense and annoyance. Further, that the public will receive no benefit from such labels; that purchasers of such powders do not know the meaning of the terms used; that it is unjust to cause a manufacturer or dealer in pure powders to submit to such a law, for the purpose of exposing those who make or deal in a harmful article; that if such a law can be enforced against baking-powders, without reference to their purity, then pure sugar, pure flour, and other pure staple articles of

food may be likewise brought under similar restrictions, and to single out baking-powder in this manner is class legislation and void.

There is nothing new in all these objections. The field has been fully covered by decisions of this court wherein the general principles controlling these cases have been established, and it is only necessary to refer to them. The 1889 law was construed in the case of *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410. As above stated, that law required the label only as to powders containing alum. The court say: "The statute does not prohibit the manufacture or sale of baking-powder containing alum, but requires the fact, when alum is a constituent of it, to be disclosed in the manner specified. We have no doubt that it is within the power of the legislature to impose this requirement. We need not enter upon a consideration of the question as to whether the use of alum in food in such quantities as might be included in a baking powder is or is not injurious to health. The validity of that part of the law which we are considering does not depend upon the fact being that it is injurious."

⁴⁴⁹ Then follows a very full statement of the reasons for sustaining the law. They are as follows: That the use of baking-powder compounds has become common; that, being a compound, the people should know the contents, that they may judge of their quality before purchasing; that people are less easily imposed upon when the contents are thus made known. "The owner of such property may be legally required, as a matter of proper police regulation for the benefit of the people in general, to sell it for what it actually is, and upon its own merits, and is not entitled, as a matter of constitutional right, to the benefit of any additional market value which he may secure by concealing its true character."

It will be noticed that this decision rests upon the broad ground that baking-powders are a compound, the contents of which the people have a right to know before purchasing; and although the law then referred to alum compounds, the opinion expressly states that it is immaterial whether or not alum is injurious in such use. This decision covers every proposition advanced by appellants.

If there was good reason for that law at that time, there is more reason for the present law at this time. According to the testimony of an expert witness, there are nearly fifty kinds of baking-powders on the market. They are divided into several classes, which it is not here necessary to mention. It is well

known that there is a great controversy going on, the world over, as to the merits of the various kinds of baking-powder. Eminent scientists differ as to which are harmful and which are wholesome. Baking-powders are inclosed in sealed cans or boxes to protect them from moisture, and can easily be adulterated and pushed upon the market. It does not follow that, because a powder is now pure cream of tartar, some other ingredient may not be added at a future time. The state aims to deal justly by all manufacturers and dealers, by subjecting them all to the same requirements. Each manufacturer must deal honestly with the public, if he would keep their confidence; but those who have so dealt, and built up great reputations upon the excellence of their goods, should not complain at being obliged to take the public still further into their confidence by openly making known the contents of the article.

⁴⁵⁰ Appellants base their claim that the statute is class legislation upon the ground that it distinguishes baking-powders from other well-known food products, such as butter, sugar, and flour. While there is a clear distinction between baking-powders, which consist of compounds or mixtures, and the articles mentioned, which are simply primary food products, we are not prepared to say that such a statute might not be extended to include such articles, if, in the opinion of the legislature, the adulteration of those products would make it advisable. That question is not before us. But that baking-powders may be treated as a class, without being subject to the objection of being class legislation, has been decided in *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410. As stated in *State v. Smith*, 58 Minn. 35, 59 N. W. 545: "When a subject is within that [the police] power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the legislature."

Again, in *State v. Mrozinski*, 59 Minn. 465, 61 N. W. 560; "The courts will never set up their judgment against that of the legislature, and hold a police law invalid, unless it is clearly so, as having no reasonable tendency to accomplish the desired end."

The law in question reasonably tends to prevent fraud, and, for the reasons stated, is not an infringement upon private rights, and is not class legislation.

Judgments and orders affirmed.

Brown, J., absent, took no part.

PURE FOOD LAWS.—No man has a constitutional right to keep secret the composition of substances sold by him to the public as articles of food. Hence, a seller of lard substitutes may be required to label his articles with a quantitative analysis of their ingredients; and it may be made a criminal offense to sell baking-powder containing alum without a label giving such notice: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 261, 262.

NASH v. LARSON.

[80 Minn. 458, 83 N. W. 451.]

CHATTEL MORTGAGES—RIGHT TO DECLARE FORFEITURE.—A chattel mortgagee cannot arbitrarily create a forfeiture of the mortgage upon the ground that he deems himself insecure, as authorized by the mortgage, without just cause therefor based upon the existence of facts constituting reasonable ground of belief, which is a question for the determination of a jury.

REPLEVIN—DAMAGES FOR USE OF PROPERTY.—In an action of replevin a jury may assess damages for the use of the property during the time it is withheld.

Grover & Masee, for the appellant.

C. J. Gunderson, for the respondents.

459 **LOVELY, J.** This is an action to recover specific personal property (replevin) embraced in a chattel mortgage given by defendants to one O. E. Nash to secure the payment of six hundred dollars. After the execution of the mortgage Nash died. Plaintiff was appointed his administratrix, and brought suit to recover the property described in the mortgage before the notes became due, upon the claim that the conditions of such mortgage had been broken in two respects, viz., that defendants had disposed of a part of the mortgaged property; also that their course of conduct justified the plaintiff in deeming herself insecure, by reason of which defaults she became entitled to its immediate possession under an alleged breach in the usual clause in such mortgages, viz., that "if attempt be made to remove or dispose of said property, or if at any time said mortgagee, his successors or assigns, shall deem the . . . debt unsafe or insecure, he is hereby authorized . . . to enter . . . and sell the same," etc.

The defendants had a verdict for the return of the property, or the value in case return could not be had; also damages assessed at a substantial sum for withholding the same.

The evidence in this case tends to show that defendants, who had been indebted to plaintiff's intestate, had an oral contract with a third party for the purchase of certain lands, and for the purpose of obtaining an extension of time on a previous debt made the chattel mortgage referred to, and included in such mortgage not only stock, consisting of cows, horses, etc., but the crops upon such lands (which they intended to buy) for the ensuing year. It also appeared that defendants were obligated to turn over a quantity of wheat each year grown on seventy-five acres of the land contracted for to the vendor in part payment of the purchase price. After the chattel ⁴⁶⁰ mortgage was given, the verbal contract between the defendants and the owner of the lands purchased by them was consummated in a written instrument for that purpose to the same effect as the oral bargain referred to.

Owing to the death of Nash, his testimony was not obtainable at the trial, and by a familiar rule of evidence conversations between himself and the defendants were also excluded; but we are of the opinion that the testimony received reasonably tended to show that Nash, at the time he accepted the chattel mortgage, was aware of the conditions of purchase between the defendants and the owner of the land referred to, and that such chattel mortgage was given to him subject thereto. The property sold by the defendants upon which the breach of the condition in the mortgage was predicated at the trial was one cow, which it is claimed was sold by the defendants to obtain means to support the remainder of the stock, and afterward a portion of the wheat raised on the land embraced in the contract was also disposed of. There was evidence also tending to show that after the sale of the cow plaintiff relieved the defendants from strict compliance with the conditions of the mortgage, and agreed to extend the payment of the principal sum until the following year, receiving as a consideration therefor another chattel mortgage upon next year's anticipated crop; also that the plaintiff, through her agent, waived the conditions of the mortgage, which prohibited the previous sale of the cow and permitted them to dispose of the crops raised on the contracted land during the current year.

Under the statute (Gen. Stats. 1894, sec. 4145) the mortgagee (or the administratrix in this case, who claimed under him) could not arbitrarily create a forfeiture upon the ground that she deemed herself insecure without just cause based upon the exist-

ence of facts constituting a reasonable ground of belief, which was a question for the determination of a jury: *Deal v. Osborne*, 42 Minn. 102, 43 N. W. 835. Immediately after the last chattel mortgage had been executed and filed this action was brought upon the claim that there had been a breach of the conditions in the chattel mortgage to Nash. We are of the opinion that upon the whole evidence in this case it was for the jury to determine whether or not the conditions ⁴⁶¹ of the first chattel mortgage, providing against a removal of the property so far as the cow was concerned, had been waived, and, so far as the crop upon the contracted land for the current year was involved, whether they were given the right to dispose of the same.

The major portion of the assignments of error attack the evidence and instructions of the trial court upon the rule of damages. It is earnestly urged by plaintiff's counsel that the rule authorizing the jury to find the value of the use of the property in actions under the statute for claim and delivery thereof, as they did in this case, is illogical and unjust. This very question has been seriously considered and decided by this court at the present term: *Qualy v. Johnson*, 80 Minn. 408, 83 N. W. 393. In that case it was held that under the authority of previous decisions of this court in actions of this character the value of the use of the property may be recovered as damages for its wrongful detention, and we need not discuss this subject further than to refer to the opinion of Brown, J., in that case.

In this case counsel for the plaintiff very earnestly contend against the justice of this rule. We have already intimated that this suggestion is not without merit, and counsel for plaintiff insist for that reason we should not hesitate to change the doctrine which has existed as a rule of procedure for many years in this state, and pungently ask why, if the rule is wrong, change cannot be made. The rule is not altogether wrong, nor always without merit in its application, but works injustice in specific cases, depending largely upon the generous manner in which juries may dispense damages; but we do not feel justified in changing a rule which is relied upon by the profession and the courts in the administration of the law, unless the apparent hardships imposed by it would be greater than by the change to be made, and we do not think this is so clearly the case in the matter under consideration as to justify us in repealing the rule referred to. As suggested by us in *Qualy v. Johnson*, 80 Minn. 408, 83 N. W. 393, this must be done in another way.

We have carefully considered the remaining assignments of error, and find that they are without merit, and do not require special attention.

Order affirmed.

CHATTEL MORTGAGE—SALE BY MORTGAGEE.—A clause in a chattel mortgage authorizing the mortgagee to sell if at any time he feels unsafe or insecure does not mean that he may, arbitrarily and without cause, declare that he feels unsafe or insecure, but the mortgagor must be about to commit or must have committed some act that tends to impair the security: *Newlean v. Olson*, 22 Neb. 717, 8 Am. St. Rep. 286, 86 N. W. 155.

REPLEVIN—DAMAGES IN.—In replevin of property having a usable value, the value of its use during the time of its detention is a proper element of damages: *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282. See, also, *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801.

PABST BREWING COMPANY v. LISTON.

[80 Minn. 473, 83 N. W. 448.]

WAGERS—PAYMENT AFTER NOTICE BY STAKEHOLDER.—A stakeholder, who pays over money bet on an election after notification not to do so by one of the parties to the wager, pays at his peril, and if after such notice the stakeholder disregards it, an action may be maintained against him for the money.

WAGERS—ELECTIONS.—A wager on the result of an election is illegal and void.

WAGERS—NOTICE TO STAKEHOLDER.—Notice given by one of the parties to a stakeholder, the day after an election and before money wagered thereon is paid over, not to so pay it, is sufficient to arrest it in the hands of the stakeholder, and is a repudiation of the wager.

WAGERS—STAKEHOLDER, GARNISHMENT OF.—If a stakeholder of a wager has parted with the money wagered after notice not to pay it over, garnishment proceedings may be maintained against him without demand for payment. In such case the liability of the stakeholder is an indebtedness as for money had and received.

F. W. Sullivan, for the appellant.

Windom & McMahon, for the respondent.

⁴⁷⁴ COLLINS, J. November 2, 1896, defendant Liston and the intervenor Murray made a wager upon the result of the congressional election to be held in the sixth congressional district of Minnesota upon the following day, November 3d, by each

putting into the hands of a stakeholder, Rolleston, the garnishee, the sum of four hundred dollars, to be paid to the winning party when the result of the election was determined. Subsequently, this plaintiff sued Liston to recover something over six hundred dollars, and caused a garnishee summons to be served upon Rolleston. Liston lost the wager. The court found from the evidence as follows: "That after said election, and while said money, and all thereof, was in the hands of said Rolleston, garnishee, said defendant Liston notified said Rolleston not to pay the same to said Murray; that said notice has never been modified or withdrawn; that notwithstanding said notice said Rolleston did thereafter, and on November 5, 1896, pay over to said Murray the entire stake money so deposited with him; that said Liston never requested said Rolleston to return to him any part of the funds placed by said Liston in said Rolleston's hands on said wager."

The court, as a conclusion of law, found that the plaintiff was entitled to judgment against Rolleston as garnishee for the amount of four hundred dollars so placed in the latter's hands by Liston, with interest.

Counsel for the garnishee questions the sufficiency of the evidence to sustain this finding, but from an examination thereof it is very evident that it warranted a finding that before Rolleston turned over the money to Murray he was notified by Liston not to pay it over to anybody until he was advised so to do by Liston himself. In fact, the parties do not differ particularly as to what was said at one interview after the election—before the money was paid over, and consequently before the garnishee summons was served—but they do differ as to whether Rolleston was notified a second time before such service. Whether he was or was not is ⁴⁷⁵ not important, for one notification was sufficient; a second was superfluous.

A wager of money is illegal and invalid, as against good morals and sound public policy: *Wilkinson v. Tousley*, 16 Minn. 263 (299), 10 Am. Rep. 139. And as early as 1852 it was held in the then territory of Minnesota that all wagers on the event of an election were illegal and void: *Cooper v. Brewster*, 1 Minn. 73 (94). Money so wagered may be recovered by the loser of the stakeholder, if the latter has been notified by the former not to pay it over to the winner, and repayment to the loser has been demanded: *Wilkinson v. Tousley*, 16 Minn. 263 (299), 10 Am. Rep. 139. It is the universal rule in this country that a stakeholder who pays over money bet upon an election, after notifica-

tion not to do so by one of the parties pays at his peril, and if after such notice the stakeholder disregards it, an action will lie against him for the money. In this particular case the notification given before Rolleston turned the entire sum over to Murray was sufficient to arrest the money in his hands, and it amounted to a repudiation and revocation of the wager, rendering the stakeholder liable if he paid the money to anyone but Liston. The four hundred dollars remained a naked deposit in Rolleston's hands, for which an action would lie as for money had and received. This follows from the fact that the wagering contract was illegal and invalid, capable of repudiation by either party.

The question next arises as to the right of the plaintiff to garnish this money. If it had remained in the hands of Rolleston, and had been in his hands when the summons was served, there would be no question at all as to the right of the plaintiff to attach and seize the same by means of the garnishee process; for the amount deposited and due would have been nothing but an ordinary debt, and therefore liable to garnishment. But counsel for the garnishee contends that an action brought by Liston against Rolleston would have sounded in tort; that it could not have been maintained without prior demand; and therefore that garnishee process cannot reach it. But it is to be noticed that no demand would have been necessary as a preliminary to an action by Liston at the time Rolleston was warned by the service of the garnishee summons, for he had already disregarded the notice and had parted with the money.⁴⁷⁶ A demand upon him by Liston would have been useless. It was therefore unnecessary, and for that reason the liability of Rolleston, which was an indebtedness as for money had and received, was subject to garnishment. Liston could have waived the tort, if his claim against Rolleston was in tort, and could have maintained *assumpsit*. In such cases there "is no reason apparent why such money may not be secured by garnishment in states where the tort may be waived, and the money recovered by an action of *indebitatus assumpsit*": 2 Shinn on Attachment, secs. 482, 517b. Rolleston denied all liability on account of the money when he made disclosure, November 30, 1896. The money was then due and payable to the plaintiff, and from that day interest accrued upon it at the legal rate.

Order affirmed.

ELECTION WAGERS are illegal and void: See the monographic note to *Bernard v. Taylor*, 37 Am. St. Rep. 702, 703. Money bet on

an election, which is paid over by the stakeholder to the winner, contrary to the orders of the loser, after the result of the election is known, may be recovered back: *McAllister v. Hoffman*, 16 Serg. & R. 147, 16 Am. Dec. 556; note to *Gregory v. King*, 11 Am. Rep. 58. See, also, *Bernard v. Taylor*, 23 Or. 416, 37 Am. St. Rep. 693, 31 Pac. 968; *Deaver v. Bennett*, 29 Neb. 812, 26 Am. St. Rep. 415, 46 N. W. 161. Money in the hands of the depository is liable to trustee process in behalf of the creditors of either principal: Note to *Gregory v. King*, 11 Am. Rep. 58.

McKINNEY v. MILLS.

[80 Minn. 478, 83 N. W. 452.]

GARNISHMENT—SITUS OF DEBT—NONRESIDENT PARTIES.—If all the parties to an action brought in the state—the plaintiff, the defendant, and the garnishee—are nonresidents, none of them being in the state except the garnishee who is served with summons while he is within the state temporarily upon business, the garnishment process must be discharged whenever the facts are brought to the attention of the court.

GARNISHMENT—JURISDICTION.—A person served with garnishment process has a right to raise all questions as to the jurisdiction of the court to proceed against him.

Morrill & Engerud, for the appellant.

C. A. Nye, for the respondent.

479 **COLLINS, J.** The plaintiff herein, the defendant, and the garnishee were each and all domiciled in the state of North Dakota when plaintiff instituted the main action in a court of this state, and caused the garnishee summons to be served upon the garnishee, who was at the time in this state temporarily upon business, and was the only party within our jurisdiction. The indebtedness of the garnishee to the defendant arose in North Dakota, and was payable there. It never had a situs in the state of Minnesota, unless it was brought within our borders by the garnishee just prior to the service of the summons upon him.

The first question for determination is, Did the service of the summons attach and seize the debt which was due and owing from the garnishee to the defendant, both parties being actual residents of another state, and the latter being domiciled without the jurisdiction of the court in which the proceedings were pending? Tested by the rule announced in *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905, this question would

have to be answered in the affirmative. It was there said, obiter: "For the purposes of attachment, a debt has a situs wherever the debtor can be found. Wherever the creditor might sue for its recovery, there it may be attached as his property, provided the laws of the forum authorize it. Neither is it material that the debt was not made payable in the state where the attachment proceedings are instituted."

⁴⁹⁰ And it is very evident that the trial court, when making the order appealed from, acted on this rule and was governed by it. But on the real facts in the Harvey case it was unnecessary for the court to make a general statement of the law, and in the later case of *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740, these facts were clearly set forth, for the purpose of pointing out the difference between the two cases, and to demonstrate that, independent of what was said, as above quoted, the Harvey case was rightly decided. The distinction was that in the latter case the garnishee was a railway corporation doing business in Montana, where the garnishee proceedings were commenced. The debt garnished grew out of a Montana transaction, and was incurred in that state when Zeller, the main debtor, was domiciled therein. As was said in the opinion, the garnishee had a domicile in Montana for the purposes of that transaction, and the fact that Zeller subsequently left the state did not destroy this domicile or the situs of the debt for the purposes of attachment in Montana. In the latter case (*Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740), the contention was that the garnishee, a foreign corporation doing business in several different states, including Minnesota, was, for the purposes of attaching a debt due from it to the defendant, a nonresident domiciled in Minnesota, and hence subject to our garnishee laws. The court did not agree to this. The whole matter was summed up in the following paragraph in the opinion: "Neither the creditor nor the debtor resided in this state; none of the transactions out of which the indebtedness arose took place in this state; and the indebtedness was not payable in this state. Under these circumstances, the debt has not a situs in this state," a large number of cases being cited.

There were also three well-considered cases cited upon the proposition that "a debtor who is only temporarily in the state cannot be charged as a trustee or garnishee." It is stated in 14 *American and English Encyclopedia of Law*, second edition, 801, that: "The decisions on the questions as to the liability to

garnishment of debts owing to the defendant as affected by the situs of the debt are in irreconcilable conflict, arising from the different views of the ⁴⁸¹ courts as to the situs of the debt which constitutes the res, and over which the court must be able to acquire jurisdiction, where personal service is not had upon the defendant. Where the court has acquired jurisdiction over the garnishee and also over the defendant by personal service, it would seem that there is no reason for exempting from liability to condemnation in such proceeding, on account of its constructive situs, any debt owing to the defendant. . . . The general rule that the situs of a debt for the purpose of distribution, taxation, etc., is at the residence of the owner, has been practically universally acknowledged not to apply in case of garnishment proceedings."

Convincing illustrations of this are found in a large number of cases cited in support of this rule. And also: "A convincing illustration of the doctrine that the situs of a debt is not necessarily fixed by the residence of the creditor is shown by the cases which universally hold that a debt due from a resident debtor to a nonresident creditor may be subjected by garnishment proceedings to the payment of claims against such creditor, though service upon such creditor is by publication only."

And it is very frankly said in note 5 that the best doctrine seems to be that debts have no fixed situs as regards garnishment proceedings.

It is not necessary for us to determine whether or not this is the best doctrine, but an examination of the adjudicated cases will convince one that, in an effort to determine the question by reference to the general rule as to the situs of the debt, the courts have involved the question in inextricable confusion. As was said by Mr. Freeman in his annotation to *National Bank v. Furtick*, 2 Marv. (Del.) 35, 42 Atl. 479, 69 Am. St. Rep. 99, at page 116: "Such courts confound the situs of a debt for the purpose of jurisdiction of it in garnishment proceedings with its situs for the purpose of determining the rights of the parties thereto concerning it. They lose sight of the debt as an entity having but one situs, as the personal property of him to whom it is owing."

This annotation is very complete and valuable, covering, as it does, a large number of decisions. The drift of the decisions in cases where the debt is due to a nonresident from a nonresident is well stated in 14 American and English Encyclopedia of Law, 803, in the following language: ⁴⁸² "Where per-

sonal jurisdiction cannot be acquired over the defendant on account of his being a nonresident, the decisions upon the question whether a debt due to him by a nonresident may be reached by garnishment proceedings when service is had upon the latter while within the state within which the garnishment proceedings are brought are in direct conflict, arising, as heretofore said, from the attempt to give to an indebtedness a situs, and the principle that where personal jurisdiction is not acquired over the defendant jurisdiction must be acquired over the res."

The authorities collected in note 2 sustain the text, but the opposite is not without support: See note 3. In 2 Shinn on Attachment, section 491, the author says that it is well settled "in this country that an inhabitant in another state is not chargeable as a garnishee, although he is within the jurisdiction of the court, where he has come for temporary purpose, and the process of garnishment is therein regularly served upon him. Such a person served with process of garnishment will be discharged, whenever the fact is brought to the attention of the court." The cases cited by the author are all well considered, and are in full accord with the statement.

From our examination of the cases mentioned in these books, we do not feel warranted in attempting to lay down any rule except in respect to the particular case in question. As before intimated, the doctrine in the Harvey case is too broad, and is not well fortified by adjudications. The court below may have been justified in relying upon it, but it is the plain duty of this court to modify the sweeping assertion therein contained. And we do so by holding that when all of the parties to an action brought in this state—the plaintiff, the defendant, and the garnishee—are nonresidents, none of them being in the state except the garnishee, who is served with summons while he is within our borders temporarily upon business, the garnishment process must be discharged whenever the facts are brought to the attention of the court. We are of the opinion that the authorities are practically agreed upon this proposition as the only one which will adequately protect nonresidents from being twice compelled to pay their debts.

2. The claim is made that the garnishee, being a mere stakeholder, has no interest in the subject matter of the present controversy, ⁴⁸³ and for that reason cannot be heard upon the question now under consideration. It is a jurisdictional question of primary importance to the garnishee against whom a judgment is sought. It was his duty to see that the court in

which such a judgment may be rendered has jurisdiction over him, as a prerequisite to the proper entry of a judgment which he may in the future, and in the state of his residence, have to rely on as a defense in an action brought therein to enforce the collection of the debt due to this defendant. He cannot, directly or indirectly, waive an objection to the jurisdiction of the court in which these proceedings were instituted: *Rindge v. Green*, 52 Vt. 204.

The order appealed from is reversed and the cause remanded, with instructions to discharge the garnishee.

GARNISHMENT.—THE SITUS OF DEBTS for purposes of garnishment is considered at length in the note to *National Bank v. Furtick*, 60 Am. St. Rep. 113-127. See, also, the recent cases of *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 78 Am. St. Rep. 743, 57 N. E. 446; *Central of Georgia Ry. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597; *Louisville etc. R. R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181, 23 South. 825.

RUSTAD v. BISHOP.

[80 Minn. 497, 83 N. W. 449.]

GARNISHMENT—ABUSE OF PROCESS—EXEMPTIONS.—A creditor cannot, by garnishment proceedings, tie up in the hands of an employer separate amounts of money earned as wages by a laborer until the time exempting such wages has expired, and then by another garnishment proceeding appropriate these several amounts to the payment of his debt. Such proceedings are an abuse and perversion of civil process.

EXEMPTION STATUTES ARE DESIGNED to secure to laborers and their families the small fruits of their toil, and must be given such proper and liberal interpretation as will give them full force and effect.

JUDGMENTS—SETTING ASIDE.—A court has full authority to set aside its orders and judgments, for good cause shown, within a reasonable time after the party affected thereby shall have knowledge or notice thereof.

Eckman & Stevenson, for the appellants.

J. Jenswold, Jr., for the respondent.

⁴⁹⁸ **COLLINS, J.** That this is a case in which plaintiffs' attorneys have attempted to oppress the defendant by means of legal process is very evident when we state the facts.

The defendant, a laboring man with a family, a resident of the city of Duluth, became indebted to the plaintiffs in a sum

exceeding fifty dollars. Suit was brought against him September 8, 1899, and at the same time the garnishee company, for whom defendant worked as a teamster, was served with a summons in the garnishment proceedings, returnable September 18th. At the hearing the garnishee disclosed an indebtedness of thirty-one dollars and fifty cents, and defendant claimed an exemption, under General Statutes of 1894, section 5314, of twenty-five dollars. This claim was allowed, but the balance, six dollars and fifty cents, was improperly paid upon the judgment which had been entered against the defendant in the original action: See *Sheehan v. Newpick*, 77 Minn. 426, 80 N. W. 356.

⁴⁰⁹ October 9th a second affidavit in garnishment was filed, and a garnishee summons issued and served upon the same company. This was made returnable October 23d. The plaintiffs made no effort to serve notice upon the defendant, and for that reason no disclosure was made; but at this time the garnishee was owing the defendant, as wages, twelve dollars and twenty-five cents, all of which was exempt under the statute. No further proceedings were had in this garnishment. On October 24th the plaintiffs filed a third affidavit in garnishment, and caused another summons to be served upon the same company, returnable December 4th. Notice was served upon the defendant, and it appeared from the disclosure that the indebtedness to him on account of wages had increased six dollars and twenty-seven cents; the total indebtedness then being eighteen dollars and fifty-two cents. No further steps were taken, according to the record. November 3d the plaintiffs filed a fourth affidavit in garnishment, the summons being returnable December 4, 1899. No notice of this proceeding was given to the defendant, and, at plaintiffs' request, no disclosure was made. At this time the defendant had earned eight dollars and seven cents in addition to the amount before stated, making the total indebtedness twenty-six dollars and fifty-nine cents, all of which the company had retained because of these various garnishments. December 4th plaintiffs filed another affidavit, and caused another garnishee summons to be served on the company. On December 13th notice was given to defendant of this proceeding, and on the return day the garnishee made its disclosure, stating that the indebtedness to the defendant was twenty-six dollars and fifty-nine cents, for personal services rendered by him between October 1st and November 3, 1899. It appears that the garnishee made its disclosure in this form at the suggestion of

the plaintiffs' attorneys, having no counsel of its own. December 19th the plaintiffs procured judgment to be entered in the court below against the garnishee and in favor of the plaintiffs for the amount stated.

January 6, 1900, an order was issued requiring the plaintiffs to appear and show cause why an order should not be made declaring the amount found to be due by the judgment exempt under the statute; that the plaintiffs had no right, title, or claim thereto, or any part of it; and that it should be paid to defendant. The court, after the hearing, made the order to show cause absolute, but notwithstanding ⁵⁰⁰ this the plaintiffs sought to enforce the judgment against the garnishee company. Thereupon a motion was made, upon all of the records and files in the case, together with an affidavit made by an officer of the garnishee company, in which the facts in the case as above stated were fully set forth, to set aside and vacate the judgment before mentioned. At both hearings the plaintiffs appeared by counsel, and, without objection to the method of procedure, took part in the same. An order vacating the judgment was made, and the appeal is from such order.

The obvious purpose of the proceedings we have mentioned was to annoy and harass the defendant, and by these successive garnishments to accumulate in the hands of the garnishee company a sum of money to which claim might be made on the ground that more than thirty days had expired, and therefore defendant's wages were not exempt under the statute. There was outrageous abuse of legal process in every one of these garnishments after the first one, and by means of that one plaintiffs unlawfully appropriated six dollars and fifty cents. If they could proceed in this manner in five separate instances, as they did, they could continue indefinitely, to the great expense, annoyance, and vexation of the defendant and also of the garnishee. A statement of the law made in *McNally v. Wilkinson*, 20 R. I. 315, 38 Atl. 1053, in a case of like oppression and wrong, is peculiarly applicable here: "To use the process of the court to thus tie up money in the hands of a garnishee until the amount shall become large enough to satisfy the plaintiff's claim, and then, without entering the writ or writs employed for this purpose, to commence a fresh suit by attaching the fund thus accumulated, not only works a wrong upon the defendant, but it is a perversion of civil process, and cannot therefore be sanctioned. The principle that even a valid and lawful act cannot be accomplished by unlawful means, and that wherever such

means are resorted to the law will interpose to restore the party injured thereby to his rights, is a salutary and well-established doctrine of the law."

A creditor cannot be allowed to avoid and evade a beneficent exemption statute by means of repeated and successive manipulations of legal process. Moneys due for wages, and exempt under the statute, cannot be tied up in this way until the statutory period of ⁵⁰¹ thirty days has expired, and then applied or appropriated to the payment of a debt: *Collins v. Chase*, 71 Me. 434. The exemption statute was designed to secure to laborers and their families their small earnings, and it must be given such proper and liberal interpretation as will give it full force and effect. It should not be construed so as to permit the very evils and abuses which it was designed to prevent: *Sheehan v. Newpick*, 77 Minn. 426, 80 N. W. 356.

A point is made that the court was without authority to proceed in the manner adopted by the defendant's counsel to set aside the judgment. Prior to this the defendant had obtained an order of the court declaring the money to be exempt. In that proceeding counsel for the plaintiffs appeared, did not oppose on the ground of irregularity, and submitted the matter to the court upon its merits. Whether the procedure was irregular is now wholly immaterial, for the parties submitted to it—made no complaint upon the ground now urged. They must abide by the action of the court: See *Twaddle v. Mendenhall*, 80 Minn. 177, 83 N. W. 135. But if this were not true, the court in question is fully authorized to set aside its judgments and orders, for good cause shown, within thirty days after the party affected thereby shall have notice or knowledge of the same: *Special Laws 1891*, c. 53, sec. 19, subd. 5. The court was clearly acting within the statute when it set aside the judgment herein.

Order affirmed.

A STATUTE EXEMPTING WAGES from garnishment is designed to secure to laborers and their families the small fruits of their toil, and must be given such construction as will carry its beneficent design into effect: *Chapman v. Berry*, 73 Miss. 437, 55 Am. St. Rep. 546, 18 South. 918. On who are laborers within the meaning of exemption statutes, see the monographic note to *Oliver v. Macon Hardware Co.*, 58 Am. St. Rep. 303-309.

GARNISHMENT OF WAGES.—IT IS AN ABUSE of process for a creditor to direct a sheriff to serve an execution by garnishment for a debt due for personal earnings exempt from execution: *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701. Under a statute exempting twenty dollars of wages out of one

month's labor, a creditor who has procured the detention of a laborer's wages in the hands of his employer by the first service of trustee process cannot, by making a second service after the lapse of a month, deprive the laborer of the exemption granted him by the statute: See the monographic note to *Brown v. Hebard*, 91 Am. Dec. 424, 425.

LARKIN v. GLENS FALLS INSURANCE COMPANY.

[80 Minn. 527, 83 N. W. 400.]

INSURANCE—WAIVER OF PROOF OF LOSS.—If an insurer investigates the cause of a fire injuring property insured by him, and thereby obtains information sufficient to determine the amount of his liability, expressly recognized by him, and prepares proof of loss from information thus obtained, but the insured refuses to sign such proof of loss because of a stipulation of settlement therein contained, the failure of the insured to make and serve formal proof of loss is thereby waived.

INSURANCE—MUNICIPAL ORDINANCES AS PART OF CONTRACT—FIRE LIMITS.—Municipal ordinances creating and establishing fire limits are a part of a contract of insurance upon property within such limits, and the insurer is bound thereby. Hence, a contract of insurance upon property within the fire limits of a city is presumed to have been entered into with reference to its ordinances regarding the alteration and repair of buildings damaged by fire.

INSURANCE—LOSS WITHIN FIRE LIMITS—AMOUNT OF RECOVERY.—If a policy of insurance is upon a building of such material and character and situation, with relation to fire limits, that it cannot be repaired because of a city ordinance prohibiting such repair, a recovery may be had for a total loss, except that the value of what remains of the building after the fire, over and above the cost of removing it from the premises, must be deducted therefrom.

INSURANCE.—MUNICIPAL ORDINANCES establishing fire limits within a city may authorize an inspector of buildings appointed by the city to condemn insured buildings totally or partially destroyed by fire, and to refuse a permit to repair them, and when such inspector determines that a damaged building shall not be repaired, it is unlawful to repair it, and the loss becomes total to the insured.

C. E. Joslin, for the appellant.

M. Johnston and G. W. Walsh, for the respondent.

528 BROWN, J. This is an action to recover upon a fire insurance policy issued by defendant to plaintiff. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial. Three questions are presented for our consideration: 1. Whether defendant waived formal proofs of

loss; 2. Whether the action was prematurely brought; and 3. Whether plaintiff sustained a total loss. This latter question may involve one or two other questions incident thereto, and is the important question in the case.

529 1. The policy was issued on March 10, 1899, and the property covered thereby (a building in the city of St. Paul) was damaged by fire on July 31st following. No written proofs of loss were ever made or served on defendant by the insured. But within a day or two after the fire defendant's local agent learned or was informed thereof, and made an immediate investigation and reported to the company. The company directed him to make further investigation, and to procure a competent builder to make an estimate of the cost of repairing the building, informing him at the same time that proper proofs of loss would be prepared and forwarded for signature by the insured. The agent made a further investigation, and obtained an estimate of the cost of the repair of the building, and made further report to his company. Proper proofs of loss were prepared by some agent of the company, either from information possessed by the local agent or obtained from the insured, and presented to the insured for signature. He refused to sign the same because of a stipulation therein binding him to a settlement of the loss for an amount equal to the estimated cost of repairing the building. The company made an offer of settlement and to pay the cost of repairing the building, which plaintiff declined to accept because the building inspector of said city had refused to grant a permit to repair it.

The company possessed all information concerning the fire, and of facts necessary to make up the proofs of loss, and was in no way injured by a failure on the part of plaintiff to sign the proofs presented to him by its agent. The company having become possessed of all facts necessary to a determination of the question of its liability, and having expressly recognized its liability, its conduct was certainly such as to lead the insured to the belief that formal proofs would not be required, and amounted to a waiver thereof: 13 Am. & Eng. Ency. of Law, 2d ed., 345 et seq.; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Helvetia etc. Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Fink v. Lancashire Ins. Co.*, 66 Mo. App. 513; *Thierolf v. Universal etc. Ins. Co.*, 110 Pa. St. 37, 20 Atl. 412; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69

N. W. 125; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568.

2. This action was commenced on October 9, 1899. At least the summons was served on that day, as we understand it, and there is ⁵³⁰ nothing in the record to show that it was in the hands of an officer for service at any date prior thereto. All acts of defendant and its agents which we hold justified a finding of a waiver of proofs of loss occurred prior to August 9th. Sixty days, therefore, elapsed after such waiver before the commencement of the action, and it was not prematurely brought. Negotiations looking to a settlement of the loss were also had between the parties subsequent to August 9th, but enough occurred prior thereto to constitute a waiver, and what occurred after that date is important only in corroboration.

3. The principal question in the case is whether plaintiff suffered a total loss. It is not claimed that the building was totally destroyed, but it is claimed that it was damaged to such an extent as to render it practically worthless without extensive repairs, and that it could not be repaired, because the building inspector refused to grant a permit authorizing the same. Defendant did not elect to repair the building, as it had a right to do under the policy, but offered to pay the cost of such repair in full settlement of its liability.

The ordinances of the city of St. Paul create and establish fire limits in the city, within which the city assumes a supervisory control over the kind and character of buildings to be erected therein, and of the alteration and repair of the same. Certain specified kinds or classes of buildings are prohibited from being erected therein, and conditions under which a building within such limits may be altered and repaired are specified and pointed out. A building inspector is provided for, who has control and supervision over such matters. By a fair construction of such ordinances, the inspector is empowered to condemn buildings located within the fire limits whenever, in his judgment, they have been damaged by fire or decay to the extent of fifty per cent of their value; and when so condemned by him, and when he refuses a permit to make repairs on such a building, it is made unlawful for the owner thereof to make the same. There is no question in this case but that the insured building was within such fire limits, and no question but that the building inspector refused a permit to repair the same after the fire. Nor is there any question but that, without proper and suitable repairs, the building was ren-

dered practically worthless by the ⁵³¹ fire. So we are confronted with the question as to the effect of such ordinances, and the action of the inspector thereunder, on the contract of insurance.

The question is a new one in this state, and an examination of the books discloses very few adjudged cases on the subject in other states. We have found only the following: *Hamburg etc. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 113, 18 S. W. 337; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, 445; *Brown v. Royal Ins. Co.*, 1 El. & E. 853; *Fire Assn. v. Rosenthal*, 108 Pa. St. 474, 1 Atl. 303; *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 South. 472. These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurer is bound thereby. This is in line with the general doctrine that, where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract. There would seem to be no logical reason why this general rule should not apply to a case of this kind. The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. 4 *Joyce on Insurance*, section 3170, states the law as follows: "If the policy be upon a building of such material and character and situation with relation to fire limits that it cannot be repaired, because of a city ordinance prohibiting repairs to such buildings within fire limits when damaged to the extent of one-third their value by fire, . . . the insurers are prevented from repairing, and a recovery may be had for a total loss."

To this may be added the qualification that, if what remains of the building after the fire be of any value over and above the cost and expense of removing it, such excess value must be deducted from the recovery. The evidence on this subject is that the building was of no value whatever over and above what it would cost to take it down and remove it from the lot.

There can be no question as to the authority of the city to enact the ordinances in question. They are in the interests of the public welfare and within the police power, and we adopt the view that they become an integral part of all contracts of insurance upon ⁵³² property within the fire limits to which they

apply. Counsel for defendant does not seriously contend to the contrary. His main contention is that the inspector of buildings had no authority to condemn the building, or to refuse a permit to repair the same. As we have already stated, a fair and reasonable construction of the ordinances gives the inspector such power; and when he determines that a damaged building shall not be repaired, it is unlawful to repair the same. He reached such determination in this case, and refused permission to repair the building, and for this reason plaintiff contends that his loss was total. Applying the rule of the cases cited, it follows that he is correct in his position; for the evidence is sufficient to warrant the jury in finding that the building was worthless without being repaired to a considerable extent, and that the value of what remained after the fire did not exceed what it would cost to remove the same from the lot. Therefore, by the refusal of the inspector to permit him to repair the building, his loss was total.

Another question is involved in this connection, and that is, How far is the determination of the inspector that the building was damaged to the extent of fifty per cent of its value conclusive? The ordinance provides that, when the owner of the building "objects to the conclusion arrived at by the inspector," arbitrators shall be appointed, who are required to proceed and re-examine the matter and make due report. But in this case no objection was made to the conclusion of the inspector, either by the insured or insurer, and arbitrators were not called upon to act. And whether the determination of the inspector or that of the arbitrators when appealed to is final or not, we need not determine. In any event, the decision of those officers should be disturbed only upon very clear grounds: *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 South. 472.

The question was not argued by counsel, and we regard it of too much importance to be decided without full argument and due reflection. Conceding, for the purposes of this case, that the decision of such officers is not final and conclusive, and is open to judicial review, and may be impeached for fraud, collusion, or mistake, we are clearly of the opinion that the evidence is wholly insufficient to impeach it. The burden to overturn it was upon the defendant, because ⁵³² defendant alone called it in question. Plaintiff acquiesced therein. There is no suggestion of fraud, mistake, or collusion; and the only evidence offered by the defendant which would have any tendency in the

direction of impeaching it was the estimate of the cost of repairing the building, which was made by a builder soon after the fire. Such evidence, even if it had been admitted, would be insufficient, standing alone as it does, to overturn the judgment of the inspector. But such evidence was not offered for the purpose of impeaching the determination of the inspector, but on the theory that the building could be repaired, and that the cost of such repairs was the measure of defendant's liability. This theory was erroneous, as we have already seen.

We have examined all of appellant's assignments of error not necessarily covered by the main questions, and find no reason for disturbing the verdict.

Order affirmed.

INSURANCE—ORDINANCE PROHIBITING REBUILDING.—Where an insured building is partly destroyed, and the common council refuse an application for leave to repair it, there being an ordinance prohibiting the repair or reconstruction of wooden buildings within specified limits which have been injured by fire to the extent of one-third their value, the loss is regarded as total: *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613, 18 S. W. 337.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE v. KODAT.

[158 Mo. 125, 59 S. W. 73.]

WITNESSES—DIVORCED WIFE AGAINST HUSBAND.—
A divorced wife is not a competent witness against her husband in a criminal prosecution against him for an assault upon a third person occurring during their marriage and after the commencement of divorce proceedings, as to a conversation had with him and statements made by him at the time of the assault, nor as to the fact that he shot at such third party.

HUSBAND AND WIFE—DIVORCE—PRIVILEGED COMMUNICATIONS.—It is the policy of the law that such matters as are privileged during the marital relation shall remain forever inviolable, whether the relation has ceased by reason of death or divorce, and a divorced wife, from reasons of public policy, is incompetent to testify against her former husband to the same extent as if the marriage had not been dissolved.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

126 GANTT, P. J. The defendant was indicted in the circuit court of the city of St. Louis, duly arraigned, tried, and convicted, of an assault with intent to kill Mrs. Josephine Kretsch, on or about the twenty-second day of October, 1899, in the city of St. Louis.

The indictment was in the ordinary form and amply sufficient. No error has been discovered in the record proper and none pointed out by the defendant; indeed, he has no counsel in this court. The instructions were such as have been approved again and again by this court. In the motion for a new trial we note complaint is made of the refusal of certain

instructions prayed by defendant. No such instructions have been incorporated in the bill of exceptions, and as a matter of course the propriety of refusing them is not before us.

The evidence fairly establishes the following facts: The defendant and his wife had separated, she living at No. 1921 South Broadway, St. Louis, and he at a place several blocks distant. She was living in the same house with one — Stussel, the father of her illegitimate child; this child was five months old when she married the defendant. In November following the commission of the crime with which defendant is charged, and before the trial, she procured a divorce from the defendant and married Stussel.

On the evening of October 26th, the prosecuting witness, Josephine Kretsch, was at the house of Mrs. Kodat, making her a visit. They were sitting outside of the house when the defendant came up and called out to his wife, "Hello, where, I want my furniture," to which the wife replied, "You can't have any furniture until after the divorce case." The child, who was then eighteen months old, was with its mother, and he kicked the child and called it a bastard and a son of a bitch. Upon this Mrs. Kodat called upon her husband to fight her and not the child, and she took hold of him and ¹²⁷ kicked him. Mrs. Kretsch, in the meantime, had told the defendant that he ought to be ashamed of himself, and one John Holup, the landlord of the place, ordered defendant to leave the premises. The defendant said, "I'll fix you; I don't know whether you will be living to-morrow night yet"; and went away, and in about fifteen minutes returned with a pistol in his hand. Mrs. Kretsch then told Mrs. Kodat that she was afraid, and wished to go home, but Mrs. Kodat, seeing the pistol in the defendant's hand, told her to go back, and they both began running back in the yard; the defendant fired after them, the ball passing through Mrs. Kretsch's dress.

This is, in substance, the story of the shooting and the circumstances connected with it as told by witnesses, Josephine Kretsch, Mary Stussel, and John Holup; the narration of each witness, of course, being slightly different from the others in some of the details, but all corresponding in substance and in all the main facts.

Frank Kretsch was the only witness who testified on behalf of the defendant. He was the husband of the prosecuting witness, but was not living with her; he swore that his wife's reputation for truth and veracity was bad. He was

not present at the shooting and knew nothing about it. Defendant did not testify.

The evidence, if believed by the jury, was sufficient to convict defendant of having made an assault with a deadly weapon with intent to kill.

The remaining assignment of error presents a point never directly adjudicated by this court, so far as we can discover. It is this: Is a divorced wife a competent witness against her husband in a criminal prosecution against him for an assault upon a third party, when the alleged assault occurred during their marriage?

¹²⁸ At common law a husband or wife could not testify for or against each other in any legal proceeding in which the other was a party except in the prosecution of one for criminal injury to the other, as for assault and battery, rape by a third person assisted by the husband, or forcible abduction: 1 Greenleaf on Evidence, 16th ed., secs. 334, 335; State v. Berlin, 42 Mo. 572; State v. Arnold, 55 Mo. 89; State v. Willis, 119 Mo. 485, 24 S. W. 1008; State v. Evans, 138 Mo. 116, 60 Am. St. Rep. 549, 39 S. W. 462.

The statute of Missouri has modified the common-law rule to the extent that it permits them to testify against each other in divorce proceedings (Rev. Stats. 1889, sec. 8918), and by section 4218 of the Revised Statutes of 1889 they may testify for each other in criminal prosecutions, except as to confidential communications, but not against each other. It is perfectly obvious, then, that inasmuch as defendant was charged in the indictment with an assault upon Mrs. Kretsch, Mrs. Kodat would not have been a competent witness against him if she had remained his wife at the time she was offered as a witness against him. Did her divorce from him after the assault and prior to the trial render her competent? It may be conceded that it is a general rule that the competency of a witness is to be determined by his or her relation at the time his or her testimony is offered. Still, if her incapacity remained, notwithstanding the divorce, that rule would not aid the state.

As to strictly confidential communications between husband and wife, there can be no doubt whatever that neither death nor divorce will remove the incompetency of either to testify against the other as to such: 1 Greenleaf on Evidence, 16th ed., sec. 337. But the point with which we have to deal is the admissibility of evidence which does not fall within the common-law definition of confidential communications between hus-

band and wife, but does come within that of privileged statements: 1 Greenleaf on Evidence, sec. 254, and cases cited. ¹²⁹ The learned circuit court permitted the wife to testify to statements made by defendant and herself in the presence of the prosecutrix and John Holup, another witness, and a crowd of boys, and to the fact that defendant shot at the prosecutrix and herself as they ran from him, and ruled that Mrs. Kodat or Stussel could not testify to any statements made out of the presence of these persons. This ruling is not susceptible of division—that is to say, evidence of statements made by the wife and husband to each other on the one hand, and the naked fact of shooting at the prosecutrix on the other. Neither were admissible. In the recent case of Shanklin v. McCracken, 140 Mo. 348, 41 S. W. 898, Brace, J., reviewed the cases in this state, and it was ruled that by section 8922 of the Revised Statutes of 1889, the “disability of the wife was expressly continued in all cases as to any admission or conversation of her husband whether made to herself or to third parties,” and the statement made in *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506, was cited with approval, to the effect that “the wife is not a competent witness to prove what is said in a conversation by another person with her husband, nor to prove any act done in connection with such conversation, and which might be explained thereby.”

We think Mrs. Stussel's evidence as to her conversation with defendant and his statements made therein while yet his wife were incompetent, and the subsequent divorce did not remove their incompetency.

Was she competent to testify to a fact which directly showed the husband was guilty of the crime charged in the indictment, to wit, that he shot at the prosecutrix? We think most clearly not. It is the policy of the law that these things which are privileged during the marriage relation shall remain forever inviolable, whether the relation has ceased by reason of death or divorce, and the divorced wife, from reasons of public policy, is incompetent to testify against her ¹³⁰ husband to the same extent that she would have been had the marriage relation never been dissolved, and such we think is the overwhelming weight of authority: *State v. Raby*, 121 N. C. 682, 28 S. E. 490; *State v. Phelps*, 2 Tyler, 374; *State v. Boyd*, 2 Hill (S. C.), 288, 27 Am. Dec. 376; *State v. Jolly*, 3 Dev. & B. 110, 32 Am. Dec. 656.

The incompetent evidence having been received over the objection of the defendant, is presumed to have been hurtful unless the contrary clearly appears. Looking through the whole record we cannot say this evidence was harmless, and the judgment must for this reason be, and it is hereby, reversed and the cause remanded for new trial.

Sherwood and Burgess, JJ., concur.

WITNESS.—A HUSBAND OR WIFE is incompetent as a witness for or against the other to testify as to any information obtained by either during the marriage, and the same rule prevails even after the marital relation has been dissolved by divorce: *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834. See, also, *Hanselman v. Dovel*, 102 Mich. 505, 47 Am. St. Rep. 557, 60 N. W. 278.

PAUL v. DRAPER.

[158 Mo. 197, 59 S. W. 77.]

TRUSTS AND TRUSTEES—DEPOSIT IN BANK BY GUARDIAN—PREFERENCES.—Money deposited in bank as a general and not a special deposit by a guardian of minors, known by the bank to be thus deposited by him as trustee for them, cannot be paid in preference to the claims of other depositors in case of insolvency or assignment by such bank. Such general deposit passes the title thereto to the bank, and the relation of debtor and creditor, and not trustee and cestui que trust, is created between the bank and the guardian.

W. O. Mead and T. T. Loy, for the appellant.

Nixon & Wallace, for the respondent.

197 BRACE, P. J. This is an appeal from a judgment of the Webster county circuit court in favor of the defendant to the St. Louis court of appeals, where the judgment of the circuit court was reversed, but Biggs, J., one of the judges of said court, deeming the decision therein contrary to certain previous decisions of this court, the case has been certified here for determination as required by section 6 of the constitutional amendment of 1884: 73 Mo. App. 566.

The facts in the case, briefly stated, are as follows: The plaintiff is the guardian and curator of James W. ¹⁹⁸ and Nannie E. Defriese, minors. The defendant is the assignee of the State Bank of Marshfield. On the eleventh day of April, 1896, the plaintiff deposited in said bank a check as follows:

"United States Pension Agency.

"No. 341,672.

Topeka, Kansas, April 10, 1896.

"Assistant Treasurer United States, St. Louis:

"Pay to Thomas K. Paul, guardian, ten hundred and eighty-four and 53-100 dollars.

G. W. GLICK,

"United States Pension Agent.

"By T. H. Glick,

"Clerk."

And received from the bank a deposit ticket as follows:

"Deposited by T. K. Paul, Gdn., in State Bank of Marshfield, Mo., April 11, 1896 (checks), pension check, \$1,084.53. Duplicate.

T. G. SALMON,

"Assistant Cashier."

Thereupon an account was opened on the books of said bank in the name of T. K. Paul and said amount placed to his credit, and he on the same day commenced checking on the same in his own name, and between that date and the 4th of May, 1896, drew ten of such checks, amounting in the aggregate to the sum of one hundred and seventy-nine dollars and fifty cents for the use of his wards, which were paid by the bank and charged to that account, leaving a balance of nine hundred and five dollars and three cents due him on said account at that date. The pension check was in the usual course of business forwarded by said bank to its St. Louis correspondent, to whom it was paid by the United States treasury department on the 13th of April, 1896, and the proceeds went into the general assets of the bank. On some day after the 4th of May, 1896, the bank made a general assignment of its assets to the defendant for the benefit of its creditors; what those assets were, their amount, character or value, or the day on which the assignment was made does not appear. On the twenty-ninth day of July, 1896, this suit was instituted to impress a trust upon the assets of the bank in the hands of the assignee in favor of plaintiff as guardian and curator as aforesaid ¹⁸⁹⁹ for said sum of nine hundred and five dollars and three cents, and to require the payment of the same as a preferred claim.

Although the account was opened and kept and the checks thereon drawn in the name of T. K. Paul, the officers of the bank knew that the pension check was held by said Paul

only as guardian and curator of said wards. No misappropriation of the fund of the wards was intended or effected by this manner of keeping the account, and there is no question but that at the date of the assignment the balance due thereon was a credit of the trust estate, and the case would have been the same, and may be treated as if the deposit had been made, checked against, and the account kept, in the name of the plaintiff as guardian and curator of said wards. The real issue is between the plaintiff as such guardian and curator and the other creditors of the bank, and the question to be determined, whether his claim as such trustee for said balance is to be preferred to the claims of the other creditors of the bank in the distribution of its assets by the assignee.

In support of the affirmative of this proposition counsel for plaintiff cite the following Missouri cases: *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Stoller v. Coates*, 88 Mo. 514; *National Bank v. Sanford*, 62 Mo. App. 394; *Flint Road Cart Co. v. Stephens*, 32 Mo. App. 341; *Snorggrass v. Moore*, 30 Mo. App. 232. To which the majority of the court of appeals in the opinion sustaining their contention add the cases of *Phillips v. Overfield*, 100 Mo. 475, 13 S. W. 705; *In re Estate of Horner*, 66 Mo. App. 536.

These cases, as well as the other Missouri cases bearing on the question, were examined and carefully considered in the more recent cases of *Evangelical Synod v. Schoenich*, 143 Mo. 652, 45 S. W. 647, *Pundmann v. Schoenich*, 144 Mo. 149, 45 S. W. 1112, and *Tiernan v. Security etc. Assn.*, 152 Mo. 135, 53 S. W. 1072, and a further particular analysis of each is unnecessary for the ²⁰⁰ purposes of this case. The rule to be deduced from all these cases when considered together, and which may be characterized as the Missouri doctrine in contradistinction from that prevailing in some other jurisdictions, with which it is not in harmony, is, that where a trustee, agent, or bailee wrongfully mixes trust money with his own, so that it cannot be distinguished which is his own, and which is trust money, and becomes insolvent, equity will follow the trust money, by taking out of the insolvent estate of the fiduciary the amount due the cestui que trust, although it cannot be identified or separated from the other funds with which it was mixed.

In order to bring the plaintiff's case within the operation of this rule the fiduciary relation of the bank to the deposit must appear. The bank could not wrongfully mix the trust

fund with its own unless by reason of the deposit it becomes a trustee, agent, or bailee of that fund for the benefit of the cestui que trust as illustrated in some of the cases from which this rule is deduced. The fact that the deposit was of a trust fund, and known to the bank to be such, would not of itself make the bank a trustee of the fund for the benefit of the cestui que trust. In order to have that effect there must have been something in the circumstances of the deposit to constitute it a special, as contradistinguished from a general, deposit, into which two classes all deposits in commercial banks may be divided. If the deposit belonged to the former class the fiduciary relation might well arise; if to the latter, in the absence of mala fides, it could not do so, for by a general deposit in good faith the title to the fund deposited passed. The bank became the owner thereof; the relation of debtor and creditor, and not that of trustee and cestui que trust, was created: *State v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *Ayres v. Farmers' etc. Bank*, 79 Mo. 421, 49 Am. Rep. 235; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Phillips v. Overfield*, 100 Mo. 466, 13 S. W. 705; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Central Nat. Bank v. Connecticut etc. Ins. Co.*, 104 U. S. 54; *Thompson v. Riggs*, 5 Wall. 201 678; *Bank v. Millard*, 10 Wall. 152; *Morse on Banks and Banking*, 3d ed., secs. 187, 567, 568, 573; *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142; *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816; *American Trust etc. Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182; *McAfee v. Bland*, 11 Ky. Law Rep. 1, 11 S. W. 439; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005; *Wetherell v. O'Brien*, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904, and cases cited in note.

There is nothing in the evidence in this case tending to prove that the deposit was special in any sense. The suggestion that the pension check was deposited for collection only is not only not supported by any substantial evidence, but is negatived by all the facts in the case. As was said by this court, per Black, J., in *Phillips v. Overfield*, 100 Mo. 466, 13 S. W. 705: "In some cases, like that of *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571, where an agent or trustee mixes a known or definite amount of trust money with his own so that it cannot be distinguished, equity will follow the money by taking out the amount due the beneficiary. The present is no such case.

The creditors of Amos R. Phillips are entitled to some consideration as well as the distributees." So in the case in hand in which the bank became neither the bailee, agent, nor trustee of the fund deposited, as it might have done by accepting the deposit as such, its other creditors "are entitled to some consideration." By the general deposit in this case, whereby no misappropriation was intended or accomplished, the owner of this fund became a creditor of the bank and stands upon precisely the same footing as the other general depositors in the bank, who are creditors thereof, and is entitled to no preference over them. The doctrine of the authorities on this subject is made sufficiently clear by the following quotation from two of the cases cited. In *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 564, it is said, per Andrews, J., speaking for the court, that: "The equitable ²⁰² doctrine that as between creditors equality is equity admits, so far as we know of, no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears in addition that there is some recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court, doubtless, may order it to be restored to the trust. So, also, if it appears that the trust property has been wrongfully converted by the trustee, and constitutes, although in changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles that the things into which the trust property has been changed should, if required, be set apart for the trust, or if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds or proceeds of the trust property entering into and constituting a part of the assets." And by Mitchell, J., in *Fletcher v. Sharp*, 108 Ind. 276, 9 N. E. 142, that: "When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust moneys or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund." The evidence in this case shows conclusively that the deposit in question by the plain-

tiff was a general and not a special one; that there was thereby no misappropriation of the fund in fact, and, in the language of this court, "the bank simply became indebted to him in his official capacity, and he took the risk of being able to collect it when he required it": *State v. Powell*, 67 Mo. 398, 29 Am. Rep. 512; *State v. Moore*, ²⁰³ 74 Mo. 418. No property specifically belonging to the trust fund is traced into the assigned assets. The mingling of that fund by the bank with its other assets after it had been deposited as stated was no wrongful conversion thereof, but simply a mingling of its own funds, and there is no ground upon which to impress a trust in favor of the plaintiff's claim upon the assets assigned in order to give him a preference over the claims of other creditors. In other words, there is no equity founded on agreement, no wrongful conversion, and no relation of the debt to the assigned property to entitle the plaintiff to preferential payment.

Of the cases cited by counsel for plaintiff, two only can be fairly said to support their contention—*Boyer v. King*, 80 Iowa, 497, 45 N. W. 908, and *McLeod v. Evans*, 66 Wis. 406, 57 Am. Rep. 287, 28 N. W. 173, 214, the latter being the leading case cited in the former in support of the conclusion reached therein. It is sufficient to say in regard to these cases that *McLeod v. Evans*, 66 Wis. 406, 57 Am. Rep. 287, 28 N. W. 173, 214, has been overruled and its doctrine repudiated by the supreme court of Wisconsin in several later cases: *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *Henry v. Martin*, 88 Wis. 367, 60 N. W. 263; *Stevens v. Williams*, 91 Wis. 58, 64 N. W. 422, and others. And that the ruling in the Iowa case seems to have been predicated principally upon the fact that the deposit was of public funds, which, whatever may be thought of its reasoning, distinguishes it from the case in hand, in which, on principle and authority, we are satisfied that the plaintiff is not entitled to the preferences he asks. The judgment of the circuit court will therefore be affirmed, and the judgment of the St. Louis court of appeals reversed.

All concur.

BANKS.—THE RELATION OF DEPOSITORS to a bank is that of ordinary debtor and creditor; it is a relation of contract, and not of trust: *Utley v. Hill*, 156 Mo. 232, 78 Am. St. Rep. 569, 55 S. W. 1001. But where a trustee places a trust fund in a bank, and the bank, knowing its character, mingles it with its own funds, and, after using it in the payment of its debts, becomes insolvent and assigns for the benefit of creditors, the beneficiary has a right

to recover the trust fund from the assets of the bank in preference to its general creditors: *Myers v. Board of Education*, 51 Kan. 87, 87 Am. St. Rep. 263, 32 Pac. 658. See, also, *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; *Wetherell v. O'Brien*, 140 Ill. 146, 83 Am. St. Rep. 221, 29 N. E. 904.

TRAMMELL v. VAUGHAN.

[158 Mo. 214, 59 S. W. 79.]

MARRIAGE AND DIVORCE—BREACH OF PROMISE—DISEASE.—If a man develops a disease, rendering it unsafe or improper to marry, without intervening fault on his part, between the date of the contract to marry and the date appointed for the marriage, he is entitled to have the ceremony postponed until the result of the disease is known, or a cure can be effected.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—VENEREAL DISEASE—DAMAGES.—If a man, knowing that he has a contagious venereal disease, enters into a contract to marry, the woman is entitled to refuse to marry him, and to treat his condition as a breach of the contract, and as an aggravation of the damages she is entitled to recover therefor.

MARRIAGE AND DIVORCE—BREACH OF CONTRACT.—The state is a third party to every marriage contract and has a direct interest therein and in the breach thereof.

MARRIAGE AND DIVORCE.—EVERY CONTRACT OF MARRIAGE implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences.

MARRIAGE AND DIVORCE—VENEREAL DISEASE AS EXCUSE FOR BREACH OF PROMISE TO MARRY.—If a man under promise to marry is afflicted with a contagious venereal disease, he is entitled to demand that the marriage be postponed until he is cured, regardless of whether the woman consents to such postponement or not; and if he becomes afflicted with such disease without any fault or negligence on his part after entering into the contract to marry, he is not liable for damages, and the contract is broken by force of law.

MARRIAGE AND DIVORCE—VENEREAL DISEASE AS AFFECTING BREACH OF PROMISE TO MARRY.—If a man under contract to marry is afflicted with a venereal disease of a temporary character that can be easily cured, he is entitled to a postponement of the marriage until he is cured; and if such disease is of a permanent character the contract to marry is annulled, regardless of the consent or nonconsent of the woman.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—DAMAGES.—A woman is not entitled to recover damages for a breach of promise to marry growing out of her wrongful act in breaking her contract to marry a third person, even if the breach of the latter contract is induced by the man she sues.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—DAMAGES.—Compensatory damages only, and not punitive or ex-

emplary damages, as such, can be recovered for a breach of a contract of marriage.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—AGGRAVATION OF DAMAGES.—Statements made by a man that he induced a woman to promise to marry him, set the day, obtained a license, and then refused to marry, only to show others that he could marry her, may be considered in aggravation of the damages to which she is entitled for the breach of the promise to marry.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—TIME OF BRINGING ACTION.—An action for a breach of a promise to marry is not prematurely brought, if at the time it is brought the man, though afflicted with a temporary and curable venereal disease, has declared that he does not intend to keep his promise to marry at any time.

I. W. Boulware and D. H. Harris, for the appellant.

A. Finley and D. P. Bailey, for the respondent.

217 MARSHALL, J. The plaintiff sues the defendant for damages for breach of contract of marriage. The petition is in two counts. The first count alleges a contract of marriage entered into between the parties on December 4, 1896, to be performed at Hartsburg, Boone county, on December 6, 1896; the procuring of the necessary marriage license by the defendant from the recorder of Cole county; the public announcement of the contract; the meeting of the parties at **218** the appointed time and place; the willingness and offer of the plaintiff and the positive refusal of the defendant to carry out the contract; and asks five thousand dollars damages. The second count alleges that the defendant "willfully, falsely, fraudulently, and maliciously induced plaintiff to enter into said marriage contract" for the purpose of humiliating and disgracing her in the public estimation, and to prevent her marrying anyone else, but with no intention of performing the contract himself, and asks five thousand dollars damages. The prayer of the petition is for five thousand dollars actual damages and five thousand dollars exemplary damages.

The answer is a general denial and special pleas. The special pleas are: 1. An admission of the contract, the procurement of the license, the meeting at Hartsburg, and an inability to procure Rev. C. A. Mitchell to perform the ceremony; 2. A postponement of the marriage by mutual consent to an unstated time, the continuance of the defendant's visits to plaintiff, and the institution of this suit, eight days later, without notice to defendant of intention to sue, and without giving him any opportunity to carry out the contract; 3. That when the contract

was entered into the defendant believed himself to be well and physically in a proper condition to marry, but that after procuring the license and going to Hartsburg to carry out the contract he discovered, on the evening of December 5th, that, without any fault, wrong, or negligence on his part done after entering into the contract, he became afflicted with a loathsome, venereal, and contagious disease, which rendered it unsafe, unwise, improper, and morally wrong for him to marry the plaintiff at that time.

The reply is a general denial. The facts developed at the trial were briefly these: The plaintiff and defendant had formerly been engaged for many years, but that engagement was canceled about eighteen ²¹⁹ months before, and the plaintiff had become engaged to one Brown. On December 4, 1896, the plaintiff and defendant met at a spelling-bee at the Dry Forks schoolhouse, about two miles from her home. They rode to her home together that night, with the result that it was agreed that they should be married the next Sunday (December 6th) at the home of her brother in law, Mr. Bush, in Hartsburg. Accordingly, the next morning the plaintiff started with her sister Dottie and Dick Foster, a young man who worked for plaintiff's family, for Hartsburg, which was fifteen miles distant. The defendant overtook them and the plaintiff thereafter rode with him. They reached Hartsburg about half-past 11 o'clock A. M. The defendant telegraphed for Rev. Mitchell, and then the defendant and plaintiff's brother in law, Bush, went to Jefferson City and procured the marriage license. Upon their return a telegram awaited him saying Rev. Mitchell could not come. They discussed other ministers. That evening the defendant was sick, ate no supper, and went to bed early. The plaintiff and her sisters were engaged making her a wedding dress. During the night the defendant discovered, for the first time, that he had the disease aforesaid. The next morning he kept his bed. The plaintiff carried him a glass of milk, which he drank. He then told her he was too sick to marry and was going home to see his doctor. The plaintiff insisted on marrying, and he finally told her she did not know what was the matter with him, but to send her brother in law, Bush, into the room, and he would tell him and he could tell his wife and she could tell plaintiff. This was done. Then the brother in law, his wife, and the plaintiff returned to the room, and the plaintiff insisted upon the marriage taking place at once—said she would marry him as he was, and he could then go to St. Louis or some

springs for treatment for three weeks or a month and she could stay with her sister, adding that she did not believe he was sick at all. He ²²⁰ refused this proposition. That evening he drove to his home, a distance of some fifteen miles. The next morning her sister Dollie saw the defendant as she passed his house on her way home, and asked him when he was going to marry the plaintiff, and he replied he was not going to marry her at all. That day the defendant drove to Fulton, a distance of fifteen miles, and when congratulated upon his marriage, he said to several persons he was not married, did not intend to marry, only went to Hartsburg to show Alfred Longley, Bill Gibbs, and Mr. Reynolds, who did not like him or like plaintiff to associate with him, that he could marry the plaintiff if he chose.

On the next day, Tuesday, the defendant went to Hartsburg again to see the plaintiff. The evidence is conflicting as to whether on Sunday before he left her it was agreed to postpone the marriage until he got well. He says she did. In her deposition taken some time before the trial she said she agreed to postpone the marriage upon the advice of her brother in law, but on the trial she denied agreeing to a postponement, and in explanation of her testimony in her deposition said she did not know the meaning of the word "postpone." At any rate, she says that on Tuesday, when he came to see her, he told her he came to tell her he was not going to marry her. She returned to her home the following Saturday, and the next day he came to see her and told her he had been to see a doctor and was going away the first part of the next week; that nothing was said about their marrying; that he asked her if she had heard from Brown and she said no; that he then asked her if Brown was not coming out to see her that day, and she said no; that he said he was, and she replied she knew nothing about it; that she asked him if he was going to write to her while he was away, but he got on his horse and rode off and did not answer her. The next day she went to Fulton and instituted this suit. Under instructions, ²²¹ hereinafter referred to, the case was submitted to the jury, and a verdict for one thousand dollars compensatory damages and three thousand dollars exemplary damages was returned for the plaintiff. The defendant then perfected this appeal.

1. The principal question in this case is whether the defendant had a right to postpone the marriage upon the appearance of the disease between the date of the contract and the date ap-

pointed for its performance. In other words, stated broadly, whether the defendant would have been justified in marrying the plaintiff, even with her consent, while he had the disease. The proposition is stated thus broadly because it is incredible that the plaintiff would have been willing to marry him if she knew the nature and character of the disease. This, too, even if the consummation of the marriage was to be postponed until he could be cured. We prefer to believe she either did not know the nature and character of the disease, or else she did not believe he was so afflicted, and thought it was simply an excuse to keep from performing his contract. But there is no room for doubt upon this record that he had the disease, and there is no countervailing evidence that it made its appearance between the date of the contract to marry and the time appointed for the marriage, and without any intervening fault on his part.

Fortunately, there are few reported precedents for the conditions present in this case. It has been held that if a party to a marriage contract develops a disease, which renders it unsafe or improper for him to marry, without intervening fault on his part between the date of the contract and the date appointed for the marriage, he is entitled to have the ceremony postponed until the result of the disease is known or he ²²² is cured: *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621; *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166, 19 S. W. 5; *Mabin v. Webster*, 129 Ind. 430, 28 Am. St. Rep. 199, 28 N. E. 863. Of course, if the defendant entered into the contract knowing of such an impediment to its consummation, it would be an aggravation of the plaintiff's damages, and she would be entitled to refuse to marry him and to treat his condition as a breach of the contract—a fraud perpetrated upon her. Marriage is a contract, but it is not merely a civil contract, for it can only be entered into in a manner recognized by law and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein: *Blank v. Nohl*, 112 Mo. 167, 20 S. W. 477; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325. Certain marriages are prohibited by law because of their detrimental effects upon society and the human species. Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. "Willfully to communicate a venereal disease is clearly cruelty, for it is misconduct tending to impair the health and tends to render cohabitation unsafe,"

and it is, therefore, a ground for divorce, whether specifically enumerated in the statutory causes for divorce or not: 9 Am. & Eng. Ency. of Law, 2d ed., 792, and cases cited. And as specially bearing on this case, see *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499, and *Boughner v. Boughner*, 19 Ky. Law Rep. 504, 41 S. W. 26.

In *State v. Marcks*, 140 Mo. 677, 43 S. W. 1097, it was said by Sherwood, J., that intercourse with a woman, though she was willing thereto, by a man who was infected with a venereal disease would constitute the act a common assault, for the fraud vitiated the consent, and in support of the statement he cited the cases of *Regina v. Bennett*, 4 Fost. & F. 1105; *Regina v. Sinclair*, 13 Cox C. C. 28; *Commonwealth v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350.

If the principles announced in the cases hereinbefore cited be correct, it is also true that it is legally, as well as ²²³ morally, wrong for a man, while infected with such a disease, to marry, and a man for such cause is entitled to demand a postponement of the marriage until he is cured. If the thing to be performed becomes unlawful without his intervening fault after the contract is entered into, the performance is excused by force of law: *Sauner v. Insurance Co.*, 41 Mo. App. 480.

The idea that the ceremony should be performed and the consummation of the marriage postponed until he is cured is not only intolerable but obnoxious to a proper subservance of the public interests and morals. This, too, whether the woman knows his condition and consents to such an arrangement or not, for though she may be willing to waive the defect, or be indifferent to the condition or its consequences to her and her children, the third party to the contract, the state, has a right to and does object. If the disease is of a temporary character, such as was the case here, and could be easily cured, the defendant is entitled to postpone the marriage until he is cured, and if the disease is of a permanent character, such as was the fact in the North Carolina, Kentucky, and Virginia cases cited, the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so.

2. The instruction given by the court of its own motion was to the effect that if the disease was of a temporary character and could ordinarily be cured in a reasonable time, and if the plaintiff knew its character and consented to marry him, and that he should afterward subject himself to proper treatment, then the disease constituted no defense in this case; otherwise, if

the disease was permanent or rendered the defendant unfit for the discharge of marital duties. For the reasons ²²⁴ given this instruction is erroneous. The fifth and eighth instructions asked by the defendant and refused by the court, to the effect that under the circumstances of this case the defendant had a right to postpone the marriage temporarily—that is, until he was cured—whether the plaintiff consented to it or not, correctly state the law and should have been given.

The sixth instruction given for the plaintiff was also erroneous. It told the jury that if the plaintiff was engaged to Brown, and the defendant induced her to break that engagement and promise to marry the defendant, he not intending in good faith to marry her, such conduct was an aggravation of the plaintiff's damages. If the plaintiff was engaged to Brown and broke the contract, she was a wrongdoer, even though she did so to marry defendant, and she is not entitled to recover from defendant any damages growing out of her own wrongful act in breaking her promise to marry Brown: *Hahn v. Bettinger* (Minn.), 83 N. W. 467.

3. The second count of the petition alleges that the defendant entered into the contract willfully, falsely, fraudulently, and maliciously, not for the purpose of marrying her, but to humiliate and disgrace her, and asks five thousand dollars punitive damages therefor. The third instruction given for the plaintiff authorizes a verdict for punitive damages if such was the case, and the jury gave plaintiff three thousand dollars exemplary damages—that is, three times as much for punishment as it gave her for her compensatory damages. This is, as far as we are advised, the first case on record for maliciously maintaining a suit in the courts of Cupid. If the defendant fraudulently entered into the contract, the plaintiff was entitled to withdraw from the contract, for the defendant's fraud vitiated her consent. If the defendant ²²⁵ entered his suit in malice and not in love, this aggravated the plaintiff's damages, and she is entitled to recover compensation therefor, but not punitive damages. The measure of damages in cases for breach of promise of marriage "is the injury to the plaintiff's feelings, affections, and wounded pride, as well as the loss of marriage (*Wilbur v. Johnson*, 58 Mo. 603), and seduction may be given in evidence to aggravate the damages: *Green v. Spencer*, 3 Mo. 318, 26 Am. Dec. 672; *Hill v. Maupin*, 3 Mo. 324; *Wilbur v. Johnson*, 58 Mo. 603; *Bird v. Thompson*, 96 Mo. 428, 9 S. W. 788"; *Liese v. Meyer*, 143 Mo. 562, 45 S. W. 282.

The statement of the defendant to many persons after he returned from Hartsburg to the effect that he never had intended marrying the plaintiff, and had only taken the matter as far as he had to show Alfred Longley, Bill Gibbs, and Mr. Reynolds that he could marry her if he wanted to, were unmanly, cruel, and depraved, and were properly admitted in evidence to aggravate plaintiff's damages. But they do not constitute a separate cause of action, nor can exemplary or punitive damages, as such, be recovered for a breach of a contract of marriage. The law punishes the defendant for the breach of his contract by making him compensate the plaintiff whether his intentions when he entered into the contract were sincere or sinister. The plaintiff's second count, therefore, stated no distinct cause of action and her third instruction was erroneous. The jury should have been told to consider these matters as an aggravation of her damages.

This action was begun eight days after the day fixed for the marriage, and before the time plaintiff was cured or could reasonably have been cured. The evidence is conflicting as to whether the plaintiff consented to the postponement, but the defendant was entitled to postpone it until he was cured, whether she consented or not. Ordinarily, this would lead to ^{the} the conclusion that the action was prematurely brought. But in this case the defendant's acts and declarations after the date set for the marriage afford sufficient basis for the charge that he did not intend to fulfill his contract, even after he was cured. The plaintiff was therefore excused from going through the formality of waiting until he was well and then demanding a performance of the contract before instituting her suit, for his conduct subsequent to the postponement was a renunciation of the contract, and constituted a present and immediate breach of his contract, and her cause of action accrued then: *Gabriel v. Brick Co.*, 57 Mo. App. 520; *Manufacturing Co. v. McCord*, 65 Mo. App. 507; *Lawson on Contracts*, sec. 442.

For the reasons given the judgment is reversed and the cause remanded for trial anew upon the principles herein announced.

All concur.

BREACH OF PROMISE TO MARRY—VENEREAL DISEASE.—The reappearance of syphilis in a man, without his fault, after he has agreed to marry, believing that he has been cured of such disease, releases him from his contract, and is a good defense to an action for a breach of the promise to marry: *Shackleford v. Hamilton*, 93 Ky. 80, 40 Am. St. Rep. 166, 19 S. W. 5. It is otherwise, however, if a venereal disease is contracted after the prom-

ise, or if before it and he knew the same to be incurable: *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

BREACH OF PROMISE TO MARRY—DAMAGES.—The measure of damages for a breach of a promise to marry, in general, is considered in *Brown v. Odell*, 104 Tenn. 230, 78 Am. St. Rep. 914, 58 S. W. 840. Where the breach is accompanied with seduction, it is proper to give exemplary damages, which are not to be measured by the defendant's poverty: *Coryell v. Colbaugh, Coxe*, 77, 1 Am. Dec. 102.

A CONTRACT TO MARRY IMPLIES that the party making it is able to perform it, and to assume the sexual obligations that it imposes: *Roper v. Clay*, 18 Mo. 383, 59 Am. Dec. 314. See a further discussion of this subject in the monographic note to *Van Houten v. Morse*, 44 Am. St. Rep. 381-387.

ST. LOUIS v. CONSOLIDATED COAL COMPANY.

[158 Mo. 342, 59 S. W. 103.]

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—A municipal ordinance under which license fees are exacted from the owners of tugs, towboats, or barges engaged in the coasting trade between different states, and licensed therefor under the Revised Statutes of the United States, for the privilege "of towing boats into or out of the harbor, or from one place to another within such harbor," is void as an unwarrantable interference with commerce between the states, although such ordinance provides that the amount paid for such license "shall be in lieu of all wharfage during the time said license remains in force."

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—A wharfage charge may lawfully be demanded by municipal ordinance of vessels engaged in the coasting trade between different states and licensed by the United States, but the city cannot legally exact a license tax from such vessels for the privilege of navigating so much of a river or harbor as lies within the city limits. Such license tax is an unwarranted interference with interstate commerce and void.

B. Schnurmacher and C. C. Allen, for the appellant.

C. W. Thomas, for the respondent.

343 VALLIANT, J. This is a suit to recover the license charges for two steam tugs and a transfer barge operated by defendant in the harbor of St. Louis, which charges were established by an ordinance of the city which provides as **344** follows: "It shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into the harbor of this city, or from one place to another within said harbor, nor shall it be lawful for any boat or barge to

engage or continue in the business of transporting railroad cars within the harbor of this city without a license for such purpose from said city continuing in force." The ordinance then goes on to prescribe the amount of the license fee, grading it according to tonnage or capacity of the vessel, directing how it is to be collected, etc., and continues: "A reduction of forty per cent from the rates of license established by this section shall be allowed to vessels owned by residents of St. Louis, and returned and assessed for taxation within said city during the year commencing on the first day of June immediately preceding the day on which the license takes effect. The license required by this section shall not issue for a shorter period of time than one month, and the amount paid for the same shall be in lieu of all wharfage during the time that said license remains in force; provided, said boat or barge does not engage in any other than towing and transfer business." A further provision of the same section made the running of a tug or barge without the required license a misdemeanor punishable by fine. The petition alleges that the defendant, an Illinois corporation, is indebted to the plaintiff city "in the sum of thirty dollars, being the license charge imposed by said section 232 on the steam tug 'Gartside,' owned by said defendant, and employed by it in towing boats into and out of the harbor of St. Louis and from one place to another in said harbor for the period of three months from," etc. And in like terms it alleges that defendant is indebted to plaintiff in the sum of fifty dollars as license charge for the tug "Alice Parker," and one hundred and twenty dollars for the barge "Louisa," aggregating two hundred dollars for the three vessels, for which judgment is prayed.

³⁴⁵ This is the second appeal in this case. When it was here on the former appeal the only question that was raised by the defendant's answer was whether or not defendant was entitled to the forty per cent reduction which the ordinance conceded to vessels owned by residents of St. Louis and returned by them for taxation in the city. Defendant tendered with its answer then sixty per cent of the amount sued for. This court decided then that the defendant was entitled to the reduction, and reversed the judgment of the circuit court, which was contrary to that view, and remanded the cause for a new trial: *St. Louis v. Consolidated Coal Co.*, 113 Mo. 83, 20 S. W. 699. In the opinion delivered at that time we said that the ordinance was not in conflict with any provision of the constitution of this state or that of the United States. But what was then said was

in response to the issues then made by the pleadings. The only suggestion then made by defendant as to the constitutionality of the ordinance was that, if it was to be construed as discriminating against the defendant because it was not a resident of St. Louis, the ordinance was invalid. That decision was rendered December 19, 1892. Very shortly after the rendition of that decision, to wit, January 23, 1893, the supreme court of the United States, in *Harman v. Chicago*, 147 U. S. 396, 13 Sup. Ct. Rep. 306, decided that a similar ordinance of the city of Chicago was, on another point presently to be noted, in conflict with the constitution and laws of the United States. In the light of that decision the defendant amended its answer by adding that its tugs and barge were at the time referred to in the petition duly enrolled and licensed in the district for the coasting trade under the provisions of title 50 of the Revised Statutes of the United States, and were, under that authority, engaged in transporting freight upon the Mississippi river from the state of Illinois to the state of Missouri.

Upon the pleadings so amended the cause came on for ³⁴⁰trial again in the circuit court, and was submitted for judgment upon an agreed statement of facts, in which, inter alia, it was admitted that the vessels were enrolled for the coasting trade under United States authority as pleaded, and that in pursuance of that license they were "engaged in transporting freight along and upon the Mississippi river and from the state of Illinois to the state of Missouri, and that said tugs and barge were engaged in carrying principally coal and incidentally freight from the state of Illinois into the harbor of the city of St. Louis, and unloading the same into vessels that were moored at and tied to the improved wharf of the city of St. Louis."

There were other paragraphs in the agreed statement designed to affect the amount the plaintiffs would be entitled to recover if the ordinance should be held to be not wholly invalid; and there were instructions asked by the plaintiff on the theory that the ordinance was valid, but as the plaintiff's whole case rests on the ordinance, and as we are satisfied that that is entirely invalid under the constitution and laws of the United States, there is no necessity for setting out those other facts or the instructions asked predicated upon them. The trial court gave an instruction to the effect that "the license fees exacted by the ordinance were an interference with and obstruction upon commerce between the states, over which Congress has exclusive

control, and that the plaintiff cannot recover." Judgment was accordingly rendered for defendant and plaintiff appeals.

The contention on behalf of the city now is that the license fee required by the ordinance is a charge for the use of the city's wharf, and not a license tax for the privilege of navigating so much of the Mississippi river as is embraced within the city harbor. If that is a correct conclusion as to the fact, then the conclusion drawn by the learned city counselor as to the law of the case is correct.

³⁴⁷ The supreme court of the United States has in several cases decided that a wharfage charge might lawfully be demanded of vessels licensed by the United States as the vessels in this case were. In *Packet Co. v. Keokuk*, 95 U. S. 80, the court said: "If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk or remaining in it or departing from it, imposed, as it is, by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character." And further in the same opinion it is said: "No doubt, neither a state nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized." In that connection the court referred to *Cannon v. New Orleans*, 20 Wall. 577, in which it was held that a city ordinance was invalid which prescribed a rate per ton and duration of moorage "for the levee and wharfage dues on all steamboats which should land or moor in any part of the port of New Orleans." Construing that ordinance, the court said: "We are of the opinion that upon the face of the ordinance itself as applied to the recognized condition of the river and its banks within the city, the ³⁴⁸ dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it

is attached upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring."

In *Packet Co. v. St. Louis*, 100 U. S. 423, an ordinance which imposed a wharfage fee regulated by the tonnage of the vessel on every boat landing at the wharf in the city was held valid.

In *Vicksburg v. Tobin*, 100 U. S. 430, the doctrine of the cases above mentioned was reiterated, and the further point adjudged that the wharfage fee was valid though imposed on a boat that did not land immediately against the wharf, but against a wharf boat which was against the wharf, the court holding that to use the wharf boat under those conditions was to use the wharf.

In *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. Rep. 732, an ordinance of the city which imposed a charge on boats using its wharf was held to be valid, and that the fact that the charge was graduated by the tonnage of the vessel was immaterial. The court distinguishes in that case a duty on tonnage, as referred to in the federal constitution, and a charge for wharfage. "The one is imposed by the government; the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a rent charged by the owner of the property for its temporary use."

In *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. Rep. 313, the court sustained the validity of a statute of Illinois under which toll was charged for boats passing through locks and canals constructed in the Illinois river. It was there said of the federal law in question: "It did not contemplate that such navigation might not be improved by artificial means, by the ³⁴⁹ removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."

Other decisions from the same high source cited by the learned city counselor fully sustain his contention that the city may lawfully impose a reasonable charge on boats landing at its wharf or landing against a boat that is moored at the wharf,

but the cases above quoted from are sufficient to show the condition of the law on that point. All of those cases are referred to and approved in *Harman v. Chicago*, 147 U. S. 396, 13 Sup. Ct. Rep. 306, but the court distinguishes them from that case and they are to be distinguished from this. The Chicago ordinance which passed under judgment in that case was: "Sec. 1. No person or persons shall keep, use, or let for hire any tug or steam barge or towboat, for towing vessels or craft in the Chicago river, its branches or slips connected therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned." Then followed other sections indicating the amount of the license fee, the manner of its issuance, etc., and denouncing a penalty of a fine against anyone violating the ordinance.

Now, let us lay the St. Louis ordinance by the side of the Chicago enactment, and see how they differ, if at all, in legal effect: "Sec. 232. It shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into or out of the harbor of this city, or from one place to another within said harbor, nor shall it be lawful for any boat or barge to engage or continue in the business of transporting railroad cars within the harbor of this city without a license for such purpose from said ³⁵⁰ city continuing in force," followed by detail as to amount and mode of issuance of license and penalties for its violation.

Of the Chicago ordinance the court in that case said: "In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No state can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge, or towboat towing vessels or craft for hire in the Chicago river or its branches shall have a license from the city of Chicago is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore,

plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign."

It was a part of the agreed statement of facts in that case that the Chicago river had been deepened and improved for navigation by the city at its expense and the contention was that the license fee was but a reasonable charge for that service. The court said: "The attempt is made to assimilate the present case to those cases (*Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. Rep. 313, and other cases) from the fact that it is conceded that the Chicago river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for ³⁵¹ the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river."

So in the case at bar, the ordinance of the city of St. Louis does not exact the license fee on the ground of compensation for the use of its wharf, but it is for the privilege "of towing boats or other water craft into or out of the harbor or from one place to another within said harbor." It is true there is a qualified provision in the ordinance that the amount paid for the license "shall be in lieu of all wharfage during the time said license remains in force," but that clause only more clearly distinguishes the license fee from a wharfage toll, and it simply means that the city will not exact wharfage from the owner of a vessel who has paid the city license for the privilege of navigating that part of the river embraced within the city harbor. But even that exemption does not apply to all vessels carrying the city license, but only to those that do "not engage in any other than towing or transfer business."

The case is before us now upon totally different questions from those presented in the former appeal, and doubtless the decision in *Harman v. Chicago*, 147 U. S. 396, 13 Sup. Ct. Rep. 306, which, as we have seen, followed very shortly after our decision on the former appeal, suggested the changes. The defendant, in the light of that decision, discovered that its rights, under the federal constitution, as a navigator in the coasting trade, were being violated, and the plaintiff, to avoid the force of that charge, was compelled to take the position that these license fees were in fact compensation for wharfage. But that

idea was not in this case from the beginning, and is not even now found in the plaintiff's petition; the statement in the petition is that the defendant is indebted to the plaintiff for a license fee ³⁵² imposed on the tugs owned by defendant and "employed by it in towing boats into and out of the harbor of St. Louis and from one place to another within said harbor," and in that respect the petition closely follows the ordinance on which it is founded.

The constitution of the United States ordains that "Congress shall have power . . . to regulate commerce with foreign nations and among the several states": Const., art. 1, sec. 8. And: "No state shall, without the consent of Congress lay any duty of tonnage": Const., art. 1, sec. 10. We are of the opinion that the ordinance of the city of St. Louis on which this suit is founded is in violation of those provisions of the federal constitution, and therefore invalid.

This is the view taken by the learned trial judge, and the judgment of the circuit court is affirmed.

All concur, except Marshall, J., not sitting, having been of counsel.

INTERSTATE COMMERCE.—WHARFAGE FEES and taxes on tonnage, as interfering with interstate commerce, are considered in the monographic note to *People v. Wemple*, 27 Am. St. Rep. 555-557.

BEALEY v. SMITH.

[158 Mo. 515, 59 S. W. 984.]

JUDGMENTS—STARE DECISIS.—A judgment of a court of appeals becomes the law of the case upon a new trial in the circuit court, and that court has no right to disregard it, unless the facts appearing upon the second trial are essentially different from those before the court of appeals when it rendered its first decision.

JUDGMENTS—STARE DECISIS—SECOND APPEAL.—If a case comes before an appellate court a second time, it is entirely within the power of that court to hear, or refuse to hear, argument again upon the propositions decided by it when the case was before heard.

JUDGMENTS—STARE DECISIS.—An appellate court may review and reverse its former decision, even in the same case, if it is satisfied that gross or manifest injustice has been done by its former decision, or if mischiefs to be cured far outweigh any injury that might be done in the particular case by overruling prior decisions.

JUDGMENTS—STARE DECISIS—CONSTITUTIONAL LAW. The refusal of a court of appeals to review its decision on a former appeal does not relieve the supreme court, when the case is properly before it, from obeying the constitutional mandate to rehear and determine the case.

EXECUTORS AND ADMINISTRATORS—SETOFF—CONFLICT OF LAWS.—An administrator in one state may set up a counterclaim for debts due the estate placed in the hands of a non-resident for collection prior to the decedent's death and collected after his death, against a claim set up by the nonresident in the state of administration for a balance due him on a debt of the decedent. Such counterclaim is not based on tort, but is for money had and received, and cannot be defeated for lack of mutuality.

ADMINISTRATORS AND EXECUTORS—DEBT DUE FROM NONRESIDENT—COUNTERCLAIM—CONFLICT OF LAWS.—If an intestate, for many years a resident of one state, is temporarily in another state at the time of his death, and administration is had on his estate in both states, the administration in the former state is the principal administration, that of the other state being simply ancillary; and the situs of a debt due the estate by a resident of the state of ancillary administration is, for the purpose of a counterclaim, in the state of the principal administration.

J. W. Boyd, for the appellant.

Hall & Woodson, for the respondent.

518 **MARSHALL, J.** This cause was certified to this court by the Kansas City court of appeals, because one of the judges of that court was of opinion that the decision of that court in this case is in conflict with the decision of this court in *Kelly v. Thuey*, 143 Mo. 437, 438, 45 S. W. 300.

Under section 6 of the amendment of 1884 to article 6 of the constitution, it is the duty of this court, under such circumstances, to "rehear and determine said cause or proceeding as in case of jurisdiction obtained by ordinary appellate process."

The case is this: Norton Blake, formerly lived in Buchanan county. He died at the residence of his son in Louisiana, on the 26th of March, 1891, but was in legal contemplation a resident of Buchanan county, Missouri, at that time: *Bealey v. Blake*, 153 Mo. 674, 55 S. W. 288. On the 28th of May, 1891, letters of administration upon his estate were granted by the probate court of Brown county, Kansas, to Richard Huxtable. The plaintiff herein, who was Blake's son in law, resided in that county, and had in possession, as **519** agent for the deceased, certain personal property. The plaintiff presented a claim against the estate to the Kansas administrator based upon a note for \$750, dated January 20, 1890, signed by Blake, which was allowed by the probate court

in Kansas. On the 28th of July, 1892, the Kansas administrator paid the plaintiff thereon the sum of \$511.92. The Kansas administration was closed July 28, 1893. In March, 1896, the plaintiff presented to the probate court of Buchanan county against the defendant, who, as public administrator, had charge of Blake's estate in Buchanan county, Missouri, a claim for the balance of \$475.44 due on the same note for \$750, on which the Kansas administrator had paid the \$511.92. The defendant answered setting up that the plaintiff had not given full credit to Blake's estate for the indebtedness he owed it, and claimed that the plaintiff owed that estate \$800 for rent he had collected about March 1, 1891, from Blake's tenant for rent of Blake's farm in Buchanan county; also, that the plaintiff had also in like manner collected \$800 a year rent for said farm for the years 1891, 1892, 1893, 1894, and 1895; and also that the plaintiff had collected after Blake's death, four notes, aggregating, principal and interest, \$1,684.85, which was made by Gilbert Blake to Norton Blake, none of which had the plaintiff accounted for or paid, and asked that these amounts be set off against the balance due plaintiff on said note. The case was tried in the probate court of Buchanan county, and afterward on appeal in the circuit court the defendant obtained judgment against the plaintiff for \$1,701. The plaintiff appealed to the Kansas City court of appeals, where the judgment of the circuit court was reversed and the cause remanded: *Bealey v. Blake*, 70 Mo. App. 229. The ground upon which the case was reversed was that the defendant had no interest in or claim to the rents, which the plaintiff had collected, that accrued after Blake's death, but that those rents followed the ⁵²⁰ title to the land and belonged to Blake's heirs, and that an administrator under the laws of Missouri is entitled to only such rents after the death of the owner of the land as accrued after the administrator is ordered by the probate court to take charge of the land and collect the rents to pay the debts of the estate, and that such condition was not present in this case. Upon a trial anew in the circuit court the court gave a peremptory instruction to the jury to find for the plaintiff, and the jury accordingly returned a verdict for the plaintiff for \$539, and disregarded all of the defendant's counterclaims. The circuit court was, as is conceded by both sides, about to grant the defendant a new trial, because it appeared that the plaintiff had collected \$300 rent during Blake's lifetime, which under the decision of the Kansas City court of ap-

peals was a legitimate subject for a setoff by the administrator, and to prevent the court from so doing the plaintiff entered a remittitur for the \$300 so collected, with interest, aggregating \$420. This left a judgment for the plaintiff for \$119, from which the defendant appealed to the Kansas City court of appeals. The defendant claimed in that court that under the prior decision of that court the right of the defendant to set off the \$1,684.85, the proceeds of the four notes collected by the plaintiff, had been adjudicated, and therefore the trial court erred in withdrawing that right from the consideration of the jury and in giving a peremptory instruction to find for the plaintiff. The plaintiff contended that the question of the defendant's right to set off this amount was not adjudicated on former appeal, and was open to discussion on this appeal, because while that question was in the case then and was referred to by the court of appeals, it was not discussed by the plaintiff then, and the reversal was then asked simply for the error of the trial court in allowing the defendant to recover for rents collected by the plaintiff after Blake's death; and further, because it would be manifestly ⁵²¹ unjust to allow the prior decision to determine that question for the following reasons: "1. Because there was no mutuality between the respondent's claim against the estate of Norton Blake and the administrator's claim against this defendant, on account of the alleged collection by the latter of the said four notes long after the death of Norton Blake; 2. Because the administration of the estate of Norton Blake was purely local to Missouri, and was confined to the chattels having a particular situs here, and, therefore, did not include a debt against this respondent, who was a citizen of Kansas, resident there, and which debt, therefore, had a situs in Kansas; 3. Because the entire item sounded in tort and could not be maintained as a setoff."

The Kansas City court of appeals held that the right of the defendant to set off the amount of the notes so collected by the plaintiff against the demand of the plaintiff for the balance due on the \$750 note was before that court on the first appeal, and was passed upon and adjudicated then, and that such decision was the law of the case as to the trial court on the trial anew, and was not open to discussion when the case came the second time before the court of appeals, and as the trial court had not followed the decision of the court of appeals, its judgment was erroneous, and hence the judg-

ment was reversed and the cause remanded. The cause was then transferred to this court for the reason first herein stated.

1. The right of the defendant to set off the four notes against the plaintiff's demand was distinctly denied by the plaintiff, and the claim was made by the plaintiff on the first appeal that the judgment was erroneous because the trial ⁵²² court had allowed the setoff, as is shown by the brief of plaintiff's counsel, in that case: *Bealey v. Blake*, 70 Mo. App. 229. This contention was met and decided adversely to the plaintiff by the court of appeals: *Bealey v. Blake*, 70 Mo. App. 233. This decision became the law of the case upon the trial anew in the circuit court, and that court had no right to disregard it, unless the facts appearing upon the second trial were essentially different from those before the court of appeals when it rendered that opinion: *Hennessy v. Bavarian Brewing Assn.*, 145 Mo. 104, 68 Am. St. Rep. 554, 46 S. W. 966; *May v. Crawford*, 150 Mo. 524, 525, 51 S. W. 693. There is no pretense that the facts, as to this claim, were essentially so different. On the contrary, there is no room for fair-minded men to honestly differ as to the question of the plaintiff's liability to Blake's estate for the money he, plaintiff, received from the collection of these notes. The facts are practically conceded, and the defendant is entitled to recover on his counterclaim unless plaintiff's legal objections thereto are well taken. The circuit court, therefore, erred in giving the peremptory instruction to the jury to find for the plaintiff, because in so doing that court did not obey the law of the case as declared by the court of appeals. Quoad the trial court the decision of the court of appeals was the law of the case, no matter what the trial court thought about it, and no matter what arguments against such a decision had been made or omitted to be made by counsel before the court of appeals.

When the case came before the court of appeals the second time it was entirely within the power of that court to hear or refuse to hear argument again upon the propositions decided by it when the case was first there. The rule of *stare decisis* is not an ironclad rule, but it is a rule founded upon reason and experience. The rule, like all rules, has its exceptions, one of which is that an appellate court will review and reverse its former decision, even in the same case, where it is satisfied ⁵²³ that gross or manifest injustice has been done by its former decision, or where the mischiefs to be cured far outweigh any injury that might be done in the particular case by overruling

prior decisions: *Mountain Grove Bank v. Douglas Co.*, 146 Mo. 52, 47 S. W. 944. The reports of the decisions of this court afford instances where prior decisions, even in the same case, have not only been reviewed on second appeal, but also reserved: *Francis v. Blair*, 89 Mo. 291, 1 S. W. 297, reviewed and overruled in the same case on second appeal, *Francis v. Blair*, 96 Mo. 515, 9 S. W. 894; *Eans v. Eans*, 79 Mo. 53; *Gordon v. Eans*, 97 Mo. 592, 4 S. W. 112, 11 S. W. 64; *Wernse v. McPike*, 76 Mo. 249, affirmed in 86 Mo. 565, and overruled in 100 Mo. 488, 13 S. W. 809; *Kiley v. Kansas City*, 69 Mo. 102, 33 Am. Rep. 491, overruled in 87 Mo. 103, 56 Am. Rep. 443; *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383, overruled in 104 Mo. 360, 16 S. W. 505. These, and other cases not necessary to cite, point the rule and the exceptions herein noted. But this does not prove that an appellate court is compelled to permit its prior decisions in the same or other cases to be criticised in its presence or to reopen the questions then decided without its consent. It is rather a matter of grace by the court than of right in the parties. No court, however, ever refuses to grant the privilege in a proper case.

We might stop here and refuse to interfere with the decision of the Kansas City court of appeals in this case, were it not for the mandate of the constitution, which requires this court, in cases coming here upon certificate of this kind, to rehear and determine the case as in cases of jurisdiction obtained by ordinary appellate process.

2. The plaintiff, by remittitur, has taken away the manifest error of the circuit court in excluding the defendant's counterclaim for rents collected by the plaintiff before Blake's death. This leaves for determination only the defendant's counterclaim ⁵²⁴ for the four notes collected by plaintiff after Blake's death.

There is no substantial conflict in the evidence preserved in this record that the plaintiff, at and before Blake's death, had these notes in his possession, as Blake's agent, to collect them, and that he did collect \$1,684.85 on account thereof after Blake's death. Instead of turning over these assets of the estate to the administrator upon the termination of his agency by Blake's death, as he should have done, the plaintiff turned the notes into cash and kept the cash. He collected \$511.92 of the \$750 Blake owed him from the Kansas administrator, and now seeks to collect the balance Blake owed him from the Missouri administrator, without accounting to anyone for the \$1,684.85 he owes Blake's estate. His position is that

there is no mutuality between his claim against the estate and the estate's claim against him; that the Missouri administration is purely local and does not include the debt the plaintiff owes the estate, and that the situs of that debt is the residence of the plaintiff in Kansas, and that what he owes the estate sounds in tort, which cannot be set off against the debt the estate owes him.

If these contentions are well founded in law the plaintiff must be allowed to collect his debt against the estate, and go free of paying what he owes the estate, so far as the courts of this state are concerned.

In the case of *Lietman v. Lietman*, 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307, this court held that the debt due the Missouri estate of the deceased by an insolvent nonresident legatee should be set off against a legacy due such legatee. And there is no distinction in principle between the remedy applied for the collection of the debt in that case and the remedy which should be applied to the collection of the debt in this case. There is as much mutuality in this case as there was in that. In each case there was a mutual demand. The Kansas City court of ⁵²⁵ appeals had no difficulty in reaching the conclusion that the probate courts in Missouri have power to hear and decide questions of this character, and allow the claim for the difference between the demands against the estate, or enter judgment for the difference against the claimant and in favor of the estate if such is the case: *Mitchell v. Martin*, 63 Mo. App. 560.

Woerner's American Law of Administration, second edition, volume 2, section 398, states the law as follows: "The policy of the law, requiring the speedy and least expensive settlement of the estates of deceased persons, favors the trial of all matters in issue between the administrator and other persons interested in the estate in the simplest, most direct manner. The affidavit required of creditors before their claims can be entertained in the probate court compels them to disclose the existence of any setoff or counterclaim, and the amount for which they can obtain allowance is limited to the difference between the amount claimed and any sum in which they may be indebted to the estate. Hence the judgment can be for the difference only, if there had been mutual dealings between the creditors and the decedent; and this whether the estate is solvent or insolvent, whether the debts are payable simultaneously, or the one in praesenti and the other in futuro, or whether there be other

claims superior in dignity thereby affected or not; even if the debt to the estate would not have been the proper subject of set-off during the lifetime of the parties. Administrators, therefore, should, although not bound by law to do so in all the states, exhibit or plead in setoff any debt or liability of the claimant to the deceased against a claim presented for allowance against the estate."

There can be no doubt that section 2050 of the Revised Statutes of 1889 is broad enough to permit the counterclaim of the administrator against the plaintiff, for which an action of indebitatus assumpsit for money had and received would ⁵²⁸ have formerly afforded a sufficient remedy against the plaintiff's demand arising out of contract against the estate: *Green v. Conrad*, 114 Mo. 664, 21 S. W. 839. If this were not so, an insolvent debtor could secure payment in full for his claim against a solvent estate, escape liability for what he owed the estate, and thus diminish the assets of the estate which of right belong to the other creditors or the heirs. The same result would follow in this and similar cases where the claimant is a nonresident if he was allowed to come into this state to collect his claims against an estate, for the administrator here could not sue him in his state, or if he could the estate should not be reverted to the uncertainties arising from such useless and expensive circumambulation.

The position of the plaintiff is untenable, and the decision of the Kansas City court of appeals on the first appeal of this case (*Bealey v. Blake*, 70 Mo. App. 233) was correct in all its features. The Missouri administration is the principal administration, as *Blake* was a resident of Missouri. The Kansas administration was simply ancillary. The counterclaim is not based on tort. It is for money had and received.

It follows, without further elaboration, that the trial court erred; that the defendant was entitled to recover against the plaintiff, not only for the rents collected before *Blake's* death, which the plaintiff has conceded by entering a remittitur therefor, but also for the \$1,684.85 with legal interest from December 14, 1895. The judgment of the circuit court is reversed and the cause remanded with directions to enter judgment for the plaintiff for \$119, with six per cent interest from October 11, 1897, and for the defendant and against the plaintiff for \$1,684.85, with six per cent interest from December 14, 1895, and to deduct the amount of the judgment for the plaintiff from the amount of the judgment for the defendant, and to enter

final judgment for the defendant and against the plaintiff for the difference so ascertained.

All concur.

THE DOCTRINE OF STARE DECISIS is considered at length in the note to *Truxton v. Falt*, 73 Am. St. Rep. 98-106. See, also, the recent case of *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 51 Pac. 593.

ANCILLARY AND PRINCIPAL ADMINISTRATION.—Administration granted at the place of domicile of the deceased is called the principal administration, and any administration granted elsewhere is termed ancillary or auxiliary: See the monographic note to *Goodall v. Marshall*, 35 Am. Dec. 483. Consult this note, pages 483-490, for a discussion of the relative powers and duties of ancillary and principal administrators.

ON THE SUBJECT OF SETOFF, in general, see the monographic notes to *Gregg v. James*, 12 Am. Dec. 153-157; *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 578-595; *State v. Brobston*, 47 Am. St. Rep. 142-144.

VANDERGRIF v. SWINNEY.

[158 Mo. 527, 50 S. W. 71.]

USURY—DISCHARGE OF DEED OF TRUST.—A debtor may plead usurious payments made by him, as a discharge to that extent of his obligation given, as a fact preliminary to his right to have discharged and canceled by the court the deed of trust given as security for such obligation.

USURY IS AS MUCH MATTER OF AFFIRMATIVE RELIEF as it is a ground of defense.

USURY.—EQUITY MAY AID A PERSON to recover back usurious interest once paid.

EVIDENCE—DECEASED PARTNER—COMPETENCY OF WITNESS.—A person who makes a contract with two partners, together with the surviving partner who was present when the contract was made, is competent to testify about such contract after the death of the other partner.

A. Gibbs and S. Jennings, for the appellants.

J. C. Turk, for the respondent.

⁵²⁹ ROBINSON, J. The appeal in this case was originally taken to the St. Louis court of appeals. By that court the case has been certified here for the reason that the title to real estate is involved.

The action is one in equity instituted by plaintiff to have released and canceled a deed of trust made by himself on certain lands named therein to him belonging, to secure a note

made payable to one of the defendants herein, upon which note plaintiff alleged full payment and more had been made if all just credits for usurious interest exacted from him thereon are allowed, together with all the other payments made upon the principal obligation.

The specific averments of plaintiff's bill as to the relation of the different defendants to the note in controversy, and as to the part each played in its procurement and collection, as well as a detailed statement of the account between plaintiff and defendant growing out of various transactions between themselves involving the loan in question, together with other loans and the various payments made thereon, are unnecessary to recite here, as the trial court, after a full examination into all the facts, upon the issues as made, has found in favor of plaintiff, and we think properly, if the plaintiff in this character of action was entitled to have the court make the application of usurious interest exacted as a credit on the note secured by the deed of trust that its full discharge might thus be shown. This is the principal controversy of appellants' appeal. This last proposition appellants deny, and contend that our statute does not authorize a debtor who has paid usury to a creditor to bring an action ⁵⁸⁰ predicated thereon; or to have any relief whatever against his own conduct in so doing, except when he himself is sued; or, to use appellants' exact language: "This statute (Rev. Stats. 1899, sec. 3709) is a shield to be used by a debtor when suit is brought against him, but not a weapon with which to attack his creditor."

While this court has never directly passed upon the question as now raised and presented by appellant, so far as the writer at present can recall, it has, however, upon divers occasions affirmed judgment predicated upon allegations of facts essential in all their general features to the facts in this case, and in so doing has determined, as a matter of necessity, the right of the debtor to so plead the usurious payments by him made as a discharge, to that extent, of his obligation given, as facts preliminary to the right to have discharged and canceled by the court the deed of trust given as security for same, as is sought herein: *Schell v. Equitable Loan etc. Assn.*, 150 Mo. 103, 51 S. W. 406.

This case, while not announcing in direct words a construction of the statute antagonistic to that now contended for

by appellant, yet upon the action of the court therein without discussion or question is involved a construction to the contrary, since otherwise the relief sought would have been denied upon the ground that the court was wanting in authority, in the character of action before it, to have considered the facts involved. We cannot think that it was the intention of the legislature, in the enactment of section 3709 of the Revised Statutes of 1899, to confine the plea of usury to the narrow limits indicated by appellant—"a shield to be used by the debtor when suit is brought against him and not otherwise." The manifest object sought by the act was to prevent usurious exactions, and as a means to accomplish that end it was provided that usury may be pleaded as a defense in all civil actions in the courts of this state, and upon proof that usurious ⁵³¹ interest has been paid, the same, in excess of the legal rate of interest, shall be deemed as payment upon the principal debt and constitute a credit thereon, and all costs of the proceeding shall be taxed against the party guilty of the unlawful exaction.

Neither the language nor the spirit of the act warrants the restriction of the plea of usury to actions wherein the party of whom usury has been exacted is made a defendant therein, as contended by appellants, but its provisions were intended to apply whenever the question as to the liability of the principal obligations upon which usury has been paid, is drawn in controversy.

The plea is as availing where affirmative relief is asked, by him of whom usury has been exacted (as in the case at bar), as it would be for the same person to affirm its existence when he is sued upon the principal obligation, and a credit to that extent asked in discharge thereof. The statute is that usury may be pleaded, and when usurious interest is found to have been paid, it shall be deemed as a payment to that extent upon the principal debt and credited thereon, in all civil actions instituted in the courts of this state, regardless of the question whether the action has been instituted by the party receiving or paying the usurious interest. The language of the section authorizing the pleading of usury as a defense is broad and general in its terms, and nothing is to be found therein suggesting any distinction between actions wherein the debtor as plaintiff pleads the act in aid of relief sought and those in which as defendant he sets it up by way

of defense, and we see no reason why a curtailment of its meaning should be attempted by a process of judicial construction. Appellants' second contention that equity will not aid a party to recover back usurious interest once paid is equally as untenable as their first contention. As a general proposition appellants' second contention may be considered⁵³² as true, but it is totally wanting in application to the facts of the case at bar. By this proceeding plaintiff is not asking to recover back from defendants usurious interest paid by him to them, but he pleaded such usurious payments made, and asks only that the court compel the application thereof (as provided by section 3709, supra) in excess of legal interest to the payment of his principal obligation, secured by the deed of trust in controversy, and that if said principal obligation is then found to be fully discharged, the deed of trust given to secure same be ordered surrendered for cancellation and discharged of record. Here it is sought, by the plea of usury set up in plaintiff's bill, simply to have applied, as the statute directs, a payment made upon his outstanding obligation, secured by deed of trust upon real estate, and that the deed of trust given to secure the same may be ordered released. If the plea of usurious interest paid, as presented in plaintiff's bill, is not permissible as a means of securing its application to that extent to the discharge of the principal obligation secured by the deed of trust in controversy upon the debtor's property, then the statute is practically meaningless in so far as obligations secured by real estate are concerned. Appellants misconceive the general purpose of plaintiff's proceeding, as they have the scope of the statute involved. Their second contention is without merit.

The further contention is made by appellants that reversible error was committed against them by the trial court in permitting the plaintiff over their objections to testify regarding a business transaction had with one J. Brock, who, appellants claim, was an agent for the defendant M. E. Swinney, for the loaning of his money, the said J. Brock being dead at the time of the trial. The plaintiff's theory of the case was, that said Brock and the defendant M. E. Swinney, the wife of the defendant W. G. Swinney, were partners at Ash Grove, Missouri, engaged in carrying on a loan business under the⁵³³ firm name and style of Swinney & Brock, and that the note in controversy was given by plaintiff to them in payment of a

loan previously made with said firm, and that he did not know the defendant W. G. Swinney in the transaction, and did not know that the note in controversy, or either of the other notes which he signed and about which testimony was given, was made payable to said W. G. Swinney until long afterward, as he could not read or write, and supposed that the notes were made payable to the parties with whom he was directly dealing.

Defendants' contention in this respect is not well made, for the reason, first, that the rule closing the mouth of the living party to a transaction from testifying when the death of the other party is shown cannot apply here, whether we consider M. E. Swinney and J. Brock as agents for the defendant W. G. Swinney in the loaning of the money that resulted finally in the making by plaintiff of the note in controversy, or whether we consider, as did plaintiff, that the loan was made by them to him upon their own account and for themselves as copartners. The transaction of borrowing money testified to by plaintiff, to which objection is made, was, as he says, had with Mr. Brock and Mrs. Swinney, and not with Brock alone. If the transaction had been with Brock alone, whether we consider him as acting for himself or as the agent of the defendant W. G. Swinney in the matter of loaning the money to plaintiff, the testimony would have been inadmissible upon the clearest principles of law and reason, but as clearly otherwise when the transaction testified about was had with two parties together as copartners, one of whom is still living. The death of Brock has not silenced the voice of the copartner Swinney, with whom plaintiff transacted his business, along with said Brock, and unless that is done the law will not close the lips of the other party thereto. Through the mouth of Mrs. Swinney, a defendant in this action, the story of the ⁵³⁴ transaction between plaintiff and herself and Brock could be and was given.

There was no error committed against appellants on account of plaintiff's testimony in that regard. The judgment of the circuit court will be affirmed.

All concur.

USURIOUS INTEREST MAY BE RECOVERED BACK: See the monographic note to *Davis v. Garr*, 55 Am. Dec. 399; *Baum v. Thoms*, 150 Ind. 378, 65 Am. St. Rep. 368, 50 N. E. 357. Compare *Ferguson v. Soden*, 111 Mo. 206, 33 Am. St. Rep. 512, 19 S. W. 727.

MONEY PAID AS USURY MAY BE SET OFF against the principal: Note to Zeigler v. Scott, 54 Am. Dec. 402. And usurious interest paid to a mortgagee may be pleaded as a counterclaim against the assignee of the mortgage: Zeigler v. Maner, 53 S. C. 115, 69 Am. St. Rep. 842, 30 S. E. 829.

USURY.—COURTS OF EQUITY will give the borrower any relief against a usurious transaction to which he may be entitled: Note to Davis v. Garr, 55 Am. Dec. 400.

STATE v. SANDERS.

[158 Mo. 610, 59 S. W. 993.]

INDICTMENT—FORM OF.—An indictment is bad and of no effect if it fails to state that the grand jurors "upon their oath" charge the defendant with the crime mentioned in the indictment, or "upon their oaths do say" that he committed such crime.

J. G. Wear and G. D. Tinch, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

⁶¹¹ **GANTT**, P. J. At the November term, 1898, of the circuit court of Butler county the defendant was indicted for the murder of John E. Dacus. He was tried and convicted of murder in the second degree. He appeals to this court. The only question for decision is the sufficiency of the indictment, which is in the words and figures following, omitting the caption: "The grand jurors for the state of Missouri, impaneled, sworn, and charged to inquire within and for the body of the county of Butler and state aforesaid, upon their oath present and charge that Alexander Sanders, on the second day of July, 1898, at the county of Butler and state of Missouri, in and upon one John E. Dacus, then and there being, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought did make an assault and a certain pistol, a deadly weapon, which was then and there loaded with gunpowder and leaden bullets, by him, the said Alexander Sanders, held in the hand of the said Alexander Sanders, did then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought shoot off and discharge at and upon him, the said John E. Dacus, thereby and then striking the said John E. Dacus with one of said leaden bullets, inflicting on and in the abdomen of his body one mortal wound of the diameter of one-half inch and the depth ⁶¹² of six

inches, and of which said mortal wound John E. Dacus, from the second day of July in the year aforesaid until the third day of July, in the year aforesaid, at the city of Poplar Bluff, in the county aforesaid, did languish, and languishing did live, on which said third day of July in the year aforesaid, the said John E. Dacus, at the city of Poplar Bluff, in the county aforesaid, of the mortal wound aforesaid, died; and so the grand jurors aforesaid do say that the said Alexander Sanders him, the said John E. Dacus, in the manner and by the means aforesaid, feloniously, willfully, unlawfully, deliberately, premeditatedly, and of his malice aforethought did kill and murder, against the peace and dignity of the state."

The indictment is bad in that it fails to state that the grand jurors "upon their oath" charge the defendant with murder.

Under our bill of rights, article 2, section 12, of the constitution of Missouri, 1875, "no person shall, for felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

In *Ex parte Slater*, 72 Mo. 102, this court ruled that an indictment under the constitution of this state means just what it did at common law. In *State v. Meyers*, 99 Mo. 116, 12 S. W. 516, this court further held that while the legislature may change its form, it cannot change its substance without impinging upon constitutional guaranties. At common law, it was essential that the indictment should state: "And so the grand jurors upon their oath do say," etc.: *Heydon's Case*, 4 Coke, 41b; 3 Chitty's Criminal Law, 750; Wharton on Homicide, sec. 849.

⁶¹³ In *State v. Furgerson*, 152 Mo. 98, 53 S. W. 427, this court, by Burgess, J., said: "The second count is also bad for the reason that it does not conclude that the 'grand jurors upon their oaths do say,' but concludes as follows: 'So the grand jurors aforesaid do say that the said William Furgerson, him, the said Stephen G. Wilson, in the manner and by the means, etc., did murder,' instead of alleging that 'the grand jurors aforesaid upon their oaths do say,' etc."

It follows that the motion in arrest should have been sustained and the court erred in not so doing.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Sherwood and Burgess, JJ., concur.

INDICTMENT.—THE STATEMENT in an indictment that the presentment of the jury is "upon their oaths" is a part of the caption, and if it has been omitted it may be inserted even after conviction: *State v. Creight*, 1 Brev. 169, 2 Am. Dec. 656. See, further, *Palmer v. People*, 138 Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130; monographic note to *Schaffer v. State*, 3 Am. St. Rep. 280.

FIRST NATIONAL BANK OF MEXICO v. RAGSDALE.

[158 Mo. 668, 59 S. W. 987.]

CHATTEL MORTGAGES—NOMINAL MORTGAGEE—NON-DELIVERY—PASSING OF TITLE.—If a person executes a note and a chattel mortgage to secure it, making them payable to a person to whom he owes nothing, indorsing the name of the payee thereon, and sends them to a third person, with the request that the latter indorse and sell them and send him the proceeds, there is no title to the note and mortgage in the payee named, for want of a debt and want of delivery, and it is not necessary for such nominal mortgagee to assign the note and mortgage in order to pass the title.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—PROOF OF INDORSEMENT.—The bona fide purchaser of a note from the maker, or from an indorsee of his with instructions to sell it and remit the proceeds, is not compelled in replevin for livestock mortgaged to secure such note to prove the genuineness of the maker's indorsement when the latter holds possession of such stock.

NEGOTIABLE INSTRUMENTS—PLEADING—ESTOPPEL. In replevin for livestock mortgaged to secure a note held by a bona fide purchaser, the latter is not required to plead facts estopping the maker of the note from showing that it was not indorsed by the nominal payee, provided the actual maker of the note owns, and is in possession of, the stock sued for.

REPLEVIN OF MORTGAGED LIVESTOCK BY PURCHASER OF NOTE.—A bona fide purchaser of a note secured by chattel mortgage on livestock from the maker or his representative is, as against such mortgagor, entitled to all the rights of the original mortgagee, and may maintain replevin for the livestock without first resorting to a court of equity to establish his right.

NEGOTIABLE INSTRUMENTS—NOMINAL PAYEE—INDORSEMENT.—If a person makes a note payable to a real person, though a nominal payee, who has no interest therein nor knowledge thereof, and the maker then indorses the name of such payee on the note and puts it on the market, he cannot, as against a bona fide holder, question the genuineness of the signatures on the note when it left his hands.

CHATTEL MORTGAGES—DESCRIPTION.—If the description of property mortgaged is "one hundred and twenty head of feeding cattle now on feed in Audrain county, Missouri," and the evidence shows that the cattle in suit, at the time of its commencement, belonged to the mortgagor, and were, at the date of the mortgage, in the county named, such description is sufficient unless the mortgagor can show that at the time he had another lot of

cattle of the same description in the same county, and that was the lot covered by the mortgage.

NEGOTIABLE INSTRUMENTS—NOMINAL PAYEE—RATIFICATION.—If a note secured by mortgage is made to a nominal payee who has no interest in nor knowledge of it, his indorsement thereof and the assignment of the mortgage to him need not be shown in order to introduce the mortgage in evidence in an action of replevin by a bona fide purchaser of such note and mortgage, nor need the latter show that such nominal payee ratified the unauthorized use of his name, in order to sustain his action.

REPLEVIN—PLEADING—TITLE.—A petition in replevin averring that plaintiff is the owner and lawfully entitled to the possession of the property, is sufficient to show his interest therein and enable him to maintain his action.

PLEADING AND EVIDENCE.—FACTS ADMITTED BY ANSWER need not be proved by plaintiff.

W. W. Fry and W. M. Williams, for the appellant.

G. Robertson, J. H. Whitecotton, and J. C. Piersol, for the respondent.

³⁷⁴ VALLIANT, J. This is an action in replevin for one hundred and twenty head of cattle. The title asserted by plaintiff is founded on a chattel mortgage executed by Crockett B. Ragsdale, brother to defendant Clarence C. Ragsdale, out of whose possession the cattle were taken by the sheriff under the writ. Upon the trial, when the plaintiff offered the mortgage in evidence, it was on objection of defendant excluded by the court, judgment for defendant necessarily followed that ruling, and the ³⁷⁵ plaintiff appeals. The only question for our consideration is as to the correctness of that ruling.

There was testimony tending to show that the cattle were the property of Crockett Ragsdale, the mortgagor, and were at the date of the mortgage on pasture in Audrain county, but were, about April 1, 1896, removed to a pasture in Monroe county. The evidence that the cattle were the property of Crockett Ragsdale is contained in his deposition, and in the admissions to that effect by the defendant to the witnesses, Latimer, Wilfley, and Gentry. We are not concerned with the matter of the weight to be given this evidence; it is sufficient for our present purpose that it tends to prove the fact.

The instrument in question was in the ordinary form of a chattel mortgage, dated December 13, 1895, made and signed by Crockett B. Ragsdale, purporting to convey to the defendant Clarence C. Ragsdale "one hundred and twenty head of feeding cattle now on feed in Audrain county, Missouri," to secure a note of same date for three thousand five hundred dollars, pay-

able May 1, 1896, to the order of C. C. Ragsdale. This note was not made to evidence a debt owing by Crockett to Clarence, but for the purpose of raising the money on it in bank as was done. The note and mortgage were executed at Hannibal, without the knowledge of Clarence, and were mailed by the maker to W. A. Latimer, at Sedalia, to whom Crockett was indebted to an amount of over two thousand dollars, with the request that he, Latimer, indorse the note and get it discounted, pay himself out of the proceeds, and remit the balance to him, Crockett. Before mailing the papers to Latimer, Crockett indorsed the name of his brother Clarence on the note without the knowledge of Clarence. Latimer indorsed the note and sent it to a broker in St. Louis to be sold, and it was, through that broker, sold to the plaintiff in this case, the First National Bank of Mexico. Latimer sent the mortgage to Audrain county to be recorded and that ~~etc~~ was done. The broker who sold the note sent the proceeds, amounting with interest to something over three thousand five hundred dollars to Latimer, who deducted the amount that Crockett was owing him and remitted the balance, eleven hundred and seventy-five dollars, to Crockett, who deposited it in a bank at Perry to the credit of Clarence, and there was testimony tending to show that it was used in part payment for the cattle in question, which had previously been bought or negotiated for.

There were other facts brought out in the evidence, but they are of a character chiefly to influence the mind in weighing the evidence as to some of the facts above stated, and it will not be necessary to set them out here. Enough is stated to enable us to judge of the correctness of the ruling of the trial court in excluding the mortgage from evidence.

The trial court ruled that inasmuch as the note was payable to the order of Clarence, and he was the mortgagee, and the note was never indorsed by him, therefore the legal title to the cattle was by force of the mortgage in Clarence, and that if the plaintiff had any right under the mortgage, "it needed the interposition of a court of equity to give it force," and for that reason excluded it as evidence.

It does not appear from the evidence, and we do not understand that it is now claimed, that Clarence had any real interest in the note or mortgage, or that he claims title to the cattle by virtue of the mortgage. Crockett owed him no debt—at least none so far as the evidence shows; there was nothing, therefore, upon which to base a valid mortgage from

Crockett to Clarence; there is nothing on which to predicate a claim by Clarence through the mortgage. The only connection he has in it is the unauthorized use of his name in the transaction. If the previous business course between the two brothers was not such as to justify Crockett in indorsing Clarence's name on the note, then in legal effect the misuse ^{of} that was made of his name neither imposed liability on, nor created a right in, him. The learned trial judge, in delivering his views, said: "As to the mortgage, it never was delivered. The same assignment did not accompany the mortgage as accompanied the note. The title to that was in C. C. Ragsdale, if in anyone. What legal title did the bank have to it? It is not the assignee in any sense." That view rests on the assumption that the bank must trace its title to the mortgage through assignment from the nominal mortgagee. But that assumption rests on the further assumption that the title to the mortgage was in the nominal mortgagee, which, as we have seen, was not the case; there was no title *de jure* in him, because there was no debt on which to base a mortgage, and there was no title in fact conveyed to him, as to a passive trustee unconnected with an interest, because the deed was never delivered to him. There was, therefore, so far as he is concerned, no execution of the mortgage. But the fact remains that Crockett Ragsdale, who for the present, at least, we assume to be the owner of these cattle, issued these papers in the form of a note, apparently duly indorsed and the mortgage to secure it, issued them in this form for the purpose of putting them on the market and did put them on the market, and by such means induced the plaintiff to believe that the note and mortgage were what they purported to be, and thereby obtained from the plaintiff the full value of the paper computed as honest and genuine. Now, therefore, as against his title the court is not going to hear any question as to the genuineness of the indorsement or other impeachment of the paper. Since the plaintiff is in legal effect a bona fide purchaser of the note from Crockett Ragsdale himself, the plaintiff is not required as against him or anyone holding possession for him to prove the genuineness of the indorsement; it is sufficient to prove that the note was so indorsed when Crockett put it on the ^{of} market, and the law will not allow him to say it is not genuine: 2 Daniel on Negotiable Instruments, 4th ed., secs. 1354, 1355; 3 Randolph on Commercial Paper, sec. 1781. Plaintiff could not, under such circumstances, anticipate that an attempt would

be made by Crockett Ragsdale or anyone defending for him to impeach the indorsement, and therefore was not required to plead the facts as an estoppel: Bigelow on Estoppel, 5th ed., 698; Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 327, 17 S. W. 319.

The learned trial court was of the opinion that the plaintiff had no legal title to the mortgaged property, because there had been no assignment of the mortgage itself by the nominal mortgagee, and that if the plaintiff had any right at all "it would need the interposition of a court of equity to give it force," and the conclusion drawn was that as replevin is an action at law, plaintiff could not maintain the suit in its own name. That was the condition under the old procedure at common law. In Jones on Chattel Mortgages, section 501, it is said: "The mortgagee's legal interest does not, however, pass by his assignment of the debt. Such assignee cannot maintain replevin in his own name for the mortgaged property; though he may, in the absence of any express or implied stipulation to the contrary, bring such an action in the name of the mortgagee, who holds, in such case, the legal title in trust for such assignee's benefit." In the same way a suit on any assigned chose in action, except commercial paper, would have to be brought in the name of the assignor to the use of the assignee. But under our statute (Rev. Stats. 1899, sec. 540), "every action shall be prosecuted in the name of the real party in interest." This section embraces as well rights of the character of these in question in this suit as those under assignment of an ordinary chose in action. This doctrine was declared by our Kansas City court of appeals in a carefully ⁶⁷⁹ considered opinion by Philips, P. J.: Kingsland etc. Co. v. Chrisman, 28 Mo. App. 308. In that case, after showing that the beneficial interest in the mortgage followed the assignment of the debt, and the assignee became the real party in interest, it was said: "The spirit and object of the statute will be best expressed and executed by allowing this plaintiff to proceed in his own name immediately, to enforce his possessory right under the mortgage, rather than to compel him either to resort to the circumlocution of a bill in equity to compel an assignment of the legal title, or to bring replevin in the name of the mortgagee." To the same effect also is Willison v. Smith, 52 Mo. App. 133.

But the plaintiff in this case is in effect the purchaser from the mortgagor himself, and is as against him entitled

to all the rights of an original mortgagee. If a note should be made payable to bearer and the maker sell it in that form, the title would pass by sale and delivery. If it be made payable to a fictitious person, and the maker indorse the name of the fictitious payee upon it, and so put it upon the market, the effect would be the same as if it were payable to bearer. And if the maker should make like use of the name of a real person who has no interest in it, and no knowledge of it, it would be the same in effect as if he had used a fictitious name. As long as it is a matter between the maker and the holder, no question can arise as to the genuineness of the signatures that were on the paper when it left the maker's hands. The mortgage in this case, as against Crockett Ragsdale, passed to the plaintiff without assignment from the nominal mortgagee, as an incident to the purchase of the note, and upon maturity of the debt and default in payment the plaintiff was entitled to the cattle, if they belonged to Crockett Ragsdale.

It is objected that the description of the property in the mortgage is not sufficient. The description is "one hundred and twenty head of feeding cattle now on feed in Audrain county, Missouri." The evidence tends to show that the lot of cattle in suit belonged to Crockett Ragsdale and were at the date of the mortgage on feed in Audrain county. Until he produces some evidence to show that he had another lot of cattle filling that description, and that it was the lot covered by the mortgage and should have been taken under the writ instead of this lot, the description will be held to refer to this lot. He cannot be heard to say that the description is so vague as to be meaningless, as long as the evidence shows a lot of cattle to which it may apply, nor can anyone holding possession under his title make a similar objection. Therefore, when the plaintiff showed that the note and mortgage were as they were when they left the hands of Crockett Ragsdale, it had a right to read them in evidence without proof of the genuineness of the indorsement.

If the plaintiff should get so far into the case as to assert a claim against Clarence Ragsdale growing out of the indorsement, a different principle will be involved.

2. There was an attempt on the part of the plaintiff to prove that Clarence Ragsdale, after he was informed of the mortgage and the unauthorized use of his name in the transaction, ratified it. However relevant testimony of such fact

might be in rebuttal, if there should be proof on the part of defendant tending to show title in himself, it was immaterial as long as plaintiff was claiming only the title of Crockett Ragsdale. If the case had reached the point where there was evidence tending to show title in defendant and plaintiff was claiming that title also, or claiming in spite of it, then proof by defendant that his indorsement on the note was not genuine, and counter-proof by plaintiff of the supposed acts of ratification would come into place. But the trial had not ⁶⁸¹ reached that stage when the instruction that plaintiff could not recover was given.

3. It is objected that the petition does not state facts showing either special or general interest in plaintiff in the property. The plaintiff is not required to, and should not, set out in his petition the evidence of his title. The petition avers that the plaintiff is the owner and lawfully entitled to the possession of the property and that is sufficient on that point.

It is also objected by respondent that there was no evidence tending to show that he was in possession of the cattle at the commencement of the suit, but that fact is admitted in his answer. It was error to exclude the chattel mortgage as evidence, and for that reason the judgment of the circuit court is reversed and the cause remanded for retrial in accordance with the views herein expressed.

All concur.

A CHATTEL MORTGAGE DESCRIBING THE PROPERTY as a flock of six hundred sheep, consisting of wethers, ewes, and lambs, with their increase for the year 1882, owned by and in the possession of the mortgagor, in Linn county, Kansas, is not void for insufficiency of description: See the monographic note to Barrett v. Fisch, 14 Am. St. Rep. 241, on the sufficiency of the description of property in chattel mortgages. See, also, Avery v. Popper, 92 Tex. 337, 71 Am. St. Rep. 849, 49 S. W. 219, 50 S. W. 122.

ESTOPPEL—PLEADING.—The mode and necessity of pleading estoppel is the subject of the monographic note to Tyler v. Hall, 27 Am. St. Rep. 344-349.

NEGOTIABLE INSTRUMENT.—BONA FIDE OWNERSHIP of negotiable instruments is discussed in the monographic note to Bedell v. Herring, 11 Am. St. Rep. 309-326; Second Nat. Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080.

REPLEVIN.—A COMPLAINT in an action to recover personalty is sufficient, without any allegation of demand and refusal, where it merely alleges that the same is the property of the plaintiff, and that the defendant has become possessed of and wrongfully detains it: Oleson v. Merrill, 20 Wis. 462, 91 Am. Dec. 428. But see Wilhite v. Williams, 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256.

WHITSETT v. WAMACK.

[159 Mo. 14, 59 S. W. 961.]

PARTITION—MISSOURI STATUTE—CONSTRUCTION OF—TITLE TO PROPERTY.—The rights and interests of parties in real estate are not declared or determined by the partition statute of Missouri. It simply provides a procedure whereby such rights and interests, as they exist under the general law, may be ascertained and finally determined, and partition be made accordingly.

PARTITION—RELEASE TO COPARCENER AND HER HUSBAND—EFFECT OF LATTER'S DEED.—When three coparceners voluntarily partition their inheritance among themselves, by two of them executing a deed of release or quitclaim to the third and her husband, it conveys no title to the latter, and his grantee, by a subsequent deed, cannot, therefore, assert any title as against the wife's minor children, for the husband's deed conveyed only his curtesy.

McReynolds & Halliburton, for the appellants.

E. O. Brown and George P. Whitsett, for the respondent.

¹⁷ **BRACE, P. J.** In the year 1859 one Reuben H. Scott died intestate, seised in fee of the southeast quarter of section 34, and thirty-six acres of the northeast quarter of the southwest quarter of section 36, in township 28, range 32, in Jasper county, Missouri, leaving him surviving three children, William M., Allen Thomas, and Frances R., his only heirs at law. Afterward, in the year 1878, the said Frances R. intermarried with the defendant J. G. Wamack. Afterward, on the seventh day of February, 1879, the said William M., Allen Thomas, and Frances R. made a voluntary partition of the real estate aforesaid so inherited by them from their father by means of three deeds of that date, of one of which the following is a copy:

"This Indenture, made on the seventh day of February, A. D., one thousand eight hundred and seventy-nine, by and between W. M. Scott and Judy Scott, his wife, and A. F. Scott and M. E. Scott, his wife, heirs of Reuben H. Scott, deceased, of the county of Jasper and State of Missouri, parties of the first part; and Frances R. Wamack and J. G. Wamack her husband, of the county of Jasper, and State of Missouri, parties of the second part, *Witnesseth*, that the said parties of the first part, in consideration of the division of the estate of Reuben H. Scott, deceased, the division of which is hereby acknowledged, do by these presents, remise, release and forever quitclaim unto the said parties of the second part,

the following described lots, tracts or parcels of land, lying, being and situate in the county of Jasper and State of Missouri, to wit: One-third off of the east side of the southeast quarter of section thirty-four, township twenty-eight, range ¹⁸ thirty-two, said east lot or parcel to contain fifty-three and one-third acres, more or less. Also twelve acres, more or less, off of the south side of a thirty-six acre tract described as follows: part of the northeast of the southwest quarter, section thirty-six, township twenty-eight, range thirty-two. To Have and To Hold the same, with all the rights, immunities, privileges and appurtenances thereto belonging, unto the said parties of the second part, and their heirs and assigns, forever: so that neither the said parties of the first part, nor their heirs, nor any other person or persons for them or in their names or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred. *In Witness* whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written."

The other two deeds are in precisely the same form, in one of which "Frances R. Wamack and J. G. Wamack, her husband, and Allen T. Scott and M. E. Scott, his wife, heirs of Reuben H. Scott, deceased," are the parties of the first part, and "W. M. Scott and Judy Scott, his wife," are the parties of the second part, and the land is described as "one-third off the west side of the southeast quarter of section thirty-four, township twenty-eight, range thirty-two; said west tract or lot to contain fifty-three and one-third acres, more or less. Also twelve acres, more or less, off of the north side of a thirty-six acre tract, described as follows: part of the northeast of southwest quarter, section thirty-six, township twenty-eight, range thirty-two."

In the other, "W. M. Scott and Judy Scott, his wife, and Frances R. Wamack and J. G. Wamack, her husband, heirs of Reuben H. Scott, deceased," are the parties of the first part and "Allen T. Scott and M. E. Scott, his wife," are the parties ¹⁹ of the second part, and the land is described as "one-third of the southeast quarter of section thirty-four, township twenty-eight, range thirty-two, said third to contain fifty-three and one-third acres, more or less, and situated between the tract of W. M. Scott on the west, and Frances R. Wamack's tract lying on the east. Also twelve acres more or less, of a thirty-

six acre tract, described as follows: part of the northeast of the southwest quarter, section thirty-six, township twenty-eight, range thirty-two. Said twelve acre tract is lying and situated between the parcels of land belonging to Frances R. Wamack on the south, and W. M. Scott on the north."

These deeds were all severally acknowledged by the respective parties of the first part and duly recorded among the land records of said county in book 47, pages 86 to 96, and thereupon each took possession, and thereafter continued to hold their respective shares in severalty. Afterward, in the year 1883, the said Frances R. Wamack died, leaving her surviving three minor children by her said husband, viz., Joseph W., Allen T., and Pearl M. Wamack, who are the other defendants in this suit, in which the premises in controversy are the land described in the first of these deeds, quitclaimed as aforesaid to "Frances R. Wamack and J. G. Wamack, her husband."

Afterward, on the 1st of October, 1884, the said J. G. Wamack executed a deed of trust of that date conveying the premises in controversy to W. E. Brinkerhoff, trustee, to secure the payment of an indebtedness of three hundred and fifty dollars to Hannah C. Williams, which was duly foreclosed by sale, and the plaintiff Whitsett became the purchaser thereof, received the trustee's deed therefor, dated December 6, 1889, went into possession under the same, and afterward instituted this suit in partition, claiming in his petition that he is the owner of the undivided two-thirds of the premises, and that the minor defendants ²⁰ Joseph W., Allen T., and Pearl M. Wamack are each entitled to an undivided one-third of the remainder subject to the interest owned by defendant J. G. Wamack as the same may appear. To the petition defendant J. G. Wamack made no answer. The said minor defendants by their guardian ad litem, J. W. Halliburton, Esq., answered, setting up the title aforesaid, and claiming that the deed aforesaid to Frances R. and J. G. Wamack having been made, as appears upon the face of it, simply for the purpose of making partition of the land which the said Frances R. held in coparcenary with her brothers, and without any consideration from her husband, he acquired no title thereby, and that the only interest acquired by the plaintiff in the premises by his said mesne conveyances from the said J. G. Wamack was his life interest as the husband of the said Frances R. Wamack.

The court below sustained the claim of the plaintiff, found that he was the owner in fee of the undivided two-thirds of the premises in controversy, and of an estate in the remaining undivided third for the life of the said J. G. Wamack, and that the minor defendants were each entitled to an undivided one-ninth part of the premises, subject to said life estate, and decreed partition accordingly, from which decree the minor defendants by their guardian ad litem appeal.

Some parol evidence was introduced on the trial, but as it in no way changed the complexion of the case as shown by the records, and it appeared that the only knowledge plaintiff had of the facts of this voluntary partition was that disclosed by the records, that evidence need not be noticed.

1. Counsel for plaintiff in their argument in support of the decree of the circuit court seem to assume that our statute of partition, different in some respects from those of other states, in some way affects the title in question. But ²¹ it is not seen how this can be. The rights and interests of parties in real estate are not thereby declared or determined. By that statute a procedure is simply provided by which those rights, as they exist under the general law, may be ascertained and finally determined and partition be made accordingly. Hence, in this case of voluntary partition by deed, in which the effect of the deeds of partition upon the title in question is to be determined by the general law, that statute has no particular bearing. The suggestion that it has seems to have been made to break the force of certain decisions in other states cited by counsel for the defendants, in which the question at issue has been determined, it being so far as our own adjudications go, *res integra*. Those cases, however, did not turn upon the partition statute of those states, but upon the principle of general law applicable alike to them and the case in hand. It is apparent upon the face of the statement, and is not disputed, that this case comes within the rule laid down by Mr. Freeman, in his excellent work on Cotenancy and Partition, second edition, section 406, that: "When the partition is effected by mutual deeds between the cotenants, all these deeds must be taken and construed together as one instrument, in the light of all the surrounding circumstances to which they obviously and directly point; for by such circumstances, not only the parties to the deeds, but all persons claiming under them, are bound, it being a general rule of law and of equity that 'when a purchaser cannot make out title but by a

deed which leads him to another fact, he shall be presumed to have knowledge of that fact": *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518.

With this premise we proceed to the consideration of the cases cited, the most recent of which is the case of *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57, 12 S. E. 993, directly in point, in which one ²² Oakley Harrison, his brothers and sisters, having divided the land which they held in common from their father, by deeds of partition as in this case, and the deed of Oakley Harrison's share having been made to him and Juda, his wife, and he having died and Juda having married again, she and her second husband claimed under the deed against the children of the said Oakley. The supreme court of that state ruled that no title passed to Juda by the deed, saying, per Clark, J.: "The deed to Oakley Harrison and wife operated merely as a partition of lands and conveyed no estate to them. The land in controversy was the share of Oakley Harrison in the lands inherited by him and his brothers and sisters. This tract was ascertained to be his share by the consent partition, which was had in lieu of legal proceedings to appoint commissioners to mark it off and assign it. It is not claimed that Juda, the wife, had any interest in the land so that anything should have been assigned her, but it is contended that, by Oakley Harrison's direction, the deed was drawn to him and his wife jointly. Suppose this to be so. The grantors were not conveying any additional estate or interest to Oakley Harrison. He had bought nothing and they were not making him a present of anything. The deed only assigned to him in severalty and by metes and bounds what was already his. The grantors conveyed no part of their shares. They had no interest in the share embraced in the deed to Oakley Harrison and could convey no interest to him or anyone else. It was his by the conveyance from his father. He received no title or estate by virtue of the deed from his brothers and sisters, nor could his wife. His direction to the other heirs (if given) to convey to himself and wife could not have the effect to make the deed a conveyance of anything to his wife when it was not such as to himself. The title being already in him, the deed merely designated his ²³ share by metes and bounds and allotted it to be held in severalty. No title passed by the deed, nor by any of the deeds. 'Partition makes no degree. It only adjusts the different rights of the parties to the possession. Each does not take the

allotment by purchase, but is as much seised of it by descent from the common ancestor as of the undivided share before partition': Allnatt on Partition, 124. The deed of partition destroys the unity of possession, and henceforward each holds his share in severalty, but such deed confers no new title or additional estate in the land: 2 Blackstone's Commentaries, 186."

The learned judge further on in his opinion held that the children of Oakley Harrison were not estopped from asserting title by reason of his having caused the deed to be registered: Citing Yancey v. Radford, 86 Va. 638, 10 S. E. 972. In this state the lands of an intestate descend to his children "in parcenary" (Rev. Stats. 1889, sec. 4465), and the following extract from the opinion in the Virginia case cited is strikingly apposite to the case in hand: "It has been often said that 'partition between coparceners neither amounts to nor requires an actual conveyance. It is less than a grant. Its operation is not to pass land by a fresh investiture of the seisin, for coparceners are supposed to be already in possession of the whole lands. Partition, therefore, makes no degree; it only adjusts the different rights of the parties to the possession. Each does not take her allotment by purchase, but is as much seised of it by descent from the common ancestor as she was of her undivided share before partition': Allnatt on Partition, 124, 128. This citation from Allnatt on Partition has been often approved: 1 Lomax's Digest, 2d ed., 634; Bolling v. Teel, 76 Va. 493; 2 Minor's Institutes, 2d ed., 439, where the same is cited from Lomax's Digest, supra. This deed, standing alone, and all the deeds standing alone, and all the deeds standing together, could affect nothing more."

²⁴ In another analogous case, Dawson v. Lawrence, 13 Ohio 543, 42 Am. Dec. 210, in which it was ruled that "tenants in common making mutual deeds of bargain, sale, and release, expressing nominal considerations, do not thereby acquire or lose any title, but obtain defined boundaries to the land they previously held in common. Such deeds operate as deeds of partition only" the court said: "A simple partition by release was all the parties meant, as they specified in the recital, and no one is liable to be misled by the nominal money consideration, or the use of the words 'bargain and sale' in this connection. The parties to these deeds lost nothing and acquired nothing, except defined boundaries to the land they previously held in common."

The same effect must certainly be predicated of the deed under which the plaintiff claims in this case, in which it appears by its recitals that the only consideration was the partition and the deeds were simply deeds of release. The doctrine thus clearly defined and its application shown in the foregoing authorities seems to be supported by the general consensus of judicial opinion in the United States: *McBain v. McBain*, 15 Ohio St. 337, 86 Am. Dec. 478; *Tabler v. Wiseman*, 2 Ohio St. 207; *Farmers' etc. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; *Wade v. Deray*, 50 Cal. 376; *Avery v. Akins*, 74 Ind. 283; *Bumgardner v. Edwards*, 85 Ind. 117; *Elston v. Piggott*, 94 Ind. 14; *Dexter v. Billings*, 110 Pa. St. 135, 1 Atl. 180; *Weeks v. Haas*, 3 Watts & S. 520, 39 Am. Dec. 39; *Weiser v. Weiser*, 5 Watts, 279, 30 Am. Dec. 313; *Davis v. Agnew*, 67 Tex. 206, 2 S. W. 376; *Grigsby v. Peak*, 68 Tex. 235, 2 Am. St. Rep. 487, 4 S. W. 474; *Freeman on Cotenancy and Partition*, 2d ed., sec. 396.

There is nothing in the case of *Farmers' etc. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439, relied upon by counsel for plaintiff antagonistic to this doctrine. On the contrary, it is therein distinctly recognized and asserted, though the case is taken out of its operation, ²⁵ in favor of a subsequent purchaser by the independent valuable money consideration expressed in the registered deed. There is nothing of that kind in this case. The suggestion that there may have been included in the consideration of these partition deeds a division of the personal property of the ancestor then dead for twenty years, is too fantastical for serious consideration. We have not found in any of the cases cited by counsel for plaintiff nor in the many others we have examined anything impugning the soundness of the doctrine as stated. While the question is a new one in this state, the trend of judicial opinion seems to be in the same direction, for it has been uniformly recognized here that even judgments in partition confer no new title: *Hart v. Steedman*, 98 Mo. 452, 11 S. W. 993; *Lindell R. E. Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368. And in the opinion of Scott, J., in *Rector v. Waugh*, 17 Mo. 28, 17 Am. Dec. 251, occurs the following paragraph:

"Preston on Abstracts says, when several persons are tenants in common, the title to each share is to be carried on, precisely in the same manner as if the title to that share was a title to a distant farm: 3 Preston on Abstracts, 58. Hilliard says joint tenants and coparceners may release to each other.

In a release of this kind, a fee will pass without words of limitation. The release is deemed in law to hold, not by the release, but by the original limitation to all the parties. The release is not an alienation, but a mere discharge of the claims of one to the other. Hence a fee arises out of the original conveyance."

The only divergence from the doctrine that we have found in the authorities is in *Weeks v. Haas*, 3 Watts & S. 520, 39 Am. Dec. 39, in which it was held that: "If partition be made between tenants in common, who are *femes covert*, and mutual releases be executed to the husbands, they do not vest absolute estates in them, but only in trust for their wives. But if such releases ²⁶ do not recite the partition, but a moneyed consideration only, the purchaser without notice would take an absolute estate," and this case is cited by Mr. Freeman in support of the following proposition: "If mutual deeds of partition be made to the husbands of two tenants in common, the estates thereby acquired by the husbands are held in trust for the wives; and if the deeds appear on their face to be deeds of partition, no doubt a vendee of one of the husbands would, by force of the notice given by the deeds through which he must claim, be charged with notice of the wife's equity": Freeman on Cotenancy and Partition, 2d ed., sec. 406, p. 523. On the facts in this case in which the rights and interests of all the parties, whether legal or equitable, will be adjudicated and established, it is not important which phase of the doctrine is applied. In either view, the circuit court should have found that the minor defendants, Joseph W., Allen T., and Pearl M. Wamack, are the owners and entitled absolutely each to an equal undivided one-third of the premises, subject only to an estate for the life of their father and codefendant, J. G. Wamack, of which the plaintiff is the owner, and should have decreed partition accordingly.

The judgment of the circuit court is reversed and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion.

All concur.

PARTITION IS NOT A MEANS OF ACQUIRING TITLE: *Grigsby v. Peak*, 68 Tex. 235, 2 Am. St. Rep. 487, 4 S. W. 474; and does not decide title, or create any new title: *McBain v. McBain*, 15 Ohio St. 337, 86 Am. Dec. 478. A partition of land, whether by act of the parties or by a suit, creates no new title to the shares set off to the parties to be held in severalty. The title by which each holds his divided share after the partition is the same as that

by which his undivided interest was held and if the lands constituted an ancestral estate before partition, no change in this respect results therefrom: *Carter v. Day*, 59 Ohio St. 96, 69 Am. St. Rep. 757, 51 N. E. 907.

PARTITION—MUTUAL DEEDS—RELEASE.—When partition between tenants in common is made by consent by means of deeds mutually executed, the deeds do not pass title to any real estate: Note to *Carter v. Day*, 69 Am. St. Rep. 762. They must be taken and construed together as one instrument: See the monographic note to *Tomlin v. Hilyard*, 92 Am. Dec. 124, on parol partition. A release executed to a husband of one coheir, on voluntary partition among several children of an intestate to whom a tract of land descends, constitutes him merely a trustee for his wife: *Weeks v. Haas*, 3 Watts & S. 520, 39 Am. Dec. 39, and note.

PADGITT v. MOLL.

[150 Mo. 143, 60 S. W. 121.]

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE. — A NEWSBOY WHO JUMPS on and off a moving street-car to sell his newspapers, who does not signal the car to stop to receive him or to allow him to alight; who does not ask leave to board the car, and who jumps on and off under circumstances which clearly indicate no purpose to pay fare and no aim to be transported, but only to avail himself of the presence of persons thereon to buy his papers, is in no sense a passenger. The company owes to him only the duty of ordinary care, and if he is a child only ten years of age, and is knocked off of a moving car and injured, by coming in contact with the tongue of a wagon or the horses attached thereto, the question of his contributory negligence is for the jury.

TRIAL—AFFIDAVIT FOR CONTINUANCE—WHEN READING OF, IS ERROR.—If a defendant, in an action for personal injuries, moves, on the day of trial, for a continuance on the ground of the absence of a material witness, and files an affidavit setting up what he would testify to if present, and the plaintiff makes the admission which would authorize the affidavit to be read, whereupon the court, for its own convenience, postpones the trial for more than a month, it is error, when the case is finally called for trial, and where no showing of any further effort to obtain the absent witness is made, to permit the affidavit to be read against the plaintiff's objection, where it shows on its face that the witness lives in the city where the injury occurred, and in which the trial is had, because sufficient time has been given in which to ascertain whether or not the evidence is attainable.

TRIAL—INABILITY OF JURY TO AGREE—ERROR IN RECALLING JURY TO HEAR NOTES OF STENOGRAPHER READ.—The purpose of having the testimony at a trial taken down in shorthand is to preserve it for future reference after the trial, and for the judge's convenience to refresh his memory in reviewing the case or settling a bill of exceptions. Such notes are not for the use of the jury, and if the jury, after retirement, send a note

to the judge requesting a transcript of the testimony of certain witnesses, saying that they cannot agree without such transcript, it is error for the court, without the consent of counsel on both sides, to allow the stenographer to read to the jury his notes of the testimony of such witnesses.

APPELLATE PRACTICE—ERRORS IMMATERIAL.—In an action against the owner of a wagon and team and a street railway company, where a newsboy on a moving car was carried against the horses or wagon tongue and knocked off the car and injured, but there was no evidence of negligence on the part of the company, a judgment for the latter will be affirmed, notwithstanding errors occurring at the trial, where the action has abated as to such owner by reason of his death.

A. R. Taylor, for the appellant.

Smith P. Galt, for the respondent.

145 VALLIANT, J. Action for damages for personal injuries.

Briefly stated, the petition is that plaintiff, a boy ten years old, engaged in selling newspapers, was received on one of the street-cars of defendant corporation by its servants in charge thereof, who permitted him to ride on the car for the purpose of selling newspapers, as was their custom to do; that on this occasion plaintiff was on the running-board ¹⁴⁵ of the grip-car, and the defendant's servants in charge caused or suffered plaintiff's body to be struck by the tongue of a wagon, with mules attached belonging to defendant Moll, whereby plaintiff was thrown off and run over by the trailer-car and his leg so injured as to render it necessary to be amputated, which was done; that the servants of the corporation defendant were negligent in so causing or suffering the plaintiff to be struck by the wagon, and that negligence directly contributed to his injuries; that defendant Moll was negligent in permitting the wagon with the mules attached to stand on the street in such close proximity to the railway track unfastened and unguarded as to imperil one riding on the street-car as plaintiff was, which negligence, combined with that of the servants in charge of the car as above mentioned, caused the plaintiff to be thrown off and injured as stated. The petition concluded with statements as to his damage and suffering, and prayed judgment for fifteen thousand dollars. Answers were general denials and pleas of contributory negligence, as to which plaintiff joined issue.

The testimony on the part of plaintiff tended to show that the accident occurred on Franklin avenue, in the city of St.

Louis, along which defendant railway company's track is laid; that defendant Moll has a grocery store on the south side of Franklin avenue, between Sixth and Seventh streets, in front of which on this occasion a delivery wagon belonging to him was standing with the rear end toward the curb and in front of the store, and the horses' heads toward the track and close to it, with barely room for the cars to pass, the horses not hitched and not attended; that the plaintiff, a newsboy ten years old, had for some time previous been in the habit of jumping on the cars of defendant corporation as they passed along there, offering his ¹⁴⁷ newspapers for sale and jumping off when he had gone through that car, then boarding the next car that came along, and so on, plying his vocation; that on this occasion the car stopped at the corner of Sixth and Franklin avenue to take on passengers and then started on again, and the plaintiff jumped on the front end of the grip-car on the running-board in front of the gripman, offered his papers to a passenger on the front seat, and then passed on toward the rear of the grip-car, behind the gripman, walking on the running-board, offering his papers for sale to the passengers as he came to them, his face to the north, not looking around and not seeing the wagon and horses, and while so doing and holding to the stanchion, the moving car carried him against the wagon tongue or the horses, and knocked him off the running-board, and he fell under the trailer and the wheels ran over and crushed his leg, and it was amputated in about two hours afterward; that at the time of the accident the car was moving at a moderate rate, the gripman was at his post looking ahead, the conductor was on the rear platform.

At the close of the plaintiff's evidence the court gave an instruction, at the request of defendant Moll, that as to him the plaintiff was not entitled to recover, and refused a similar instruction as to the defendant railroad corporation. A nonsuit with leave was taken as to Moll, and the trial progressed as to the other defendant.

On the part of the defendant the testimony tended to show that the plaintiff and other newsboys were in the habit of jumping on and off the cars, plying their trade; that the company had often remonstrated and tried to prevent it, but found it impracticable to do so, and had to submit to it; that on this occasion the gripman saw the boy when he got on the car, and saw that he passed toward the rear on the running-board, but when the boy passed behind him he ¹⁴⁸ saw him no more, as

his duty as gripman required his attention to the front; that as it was a populous part of the city, wagons, etc., passing, his custom was to go slowly along there, and he was going slowly on this occasion; that the boy slipped and fell off the running-board and was not struck by the wagon at all. The gripman testified that he told the boy when he got on the car to look out for the wagons in front of Moll's; the boy testified that the gripman said nothing to him.

The cause was set for trial October 15, 1894, and when called for trial on that day defendant moved for a continuance on account of the absence of one William Flippen, and filed the affidavit of Mr. Galt, attorney for defendant, in which it was stated that he had caused a subpoena to be issued for the witness, who was a resident of the city, but had been unable up to that time to obtain service of the writ. The affidavit stated: "But affiant and the defendant believe that said William Flippen is now in said city, and by prosecuting a search therefor his attendance or testimony will be procured at the next term of said court." Then the affidavit proceeded to set forth what the witness, if present, would testify to, which was substantially that he was a passenger on the grip-car, saw the boy jump on the front end of the running-board and walk back calling his papers, and two other newsboys also jumped on; this boy passed to the rear of the gripman, and fell off when he was holding to nothing and was not struck by the wagon or mules or anything; that the gripman was looking ahead, and the car was going at half speed; that when witness saw the boy fall he hallooed to the gripman, "Stop! A boy fell off," and the gripman stopped as soon as possible. When the affidavit was filed the plaintiff admitted that if the witness were present he would testify as therein stated, and thereupon the ¹⁴⁹ court overruled the defendant's motion for continuance. Then the court, for its own convenience, postponed the trial until November 19th, and on that day the trial was begun. The defendant offered to read in evidence from the affidavit what it stated the witness if present would testify to. The plaintiff objected on the ground that there was no showing that the witness was not then within the jurisdiction of the court. The objection was overruled and the plaintiff excepted.

The evidence, instructions, and arguments were concluded on November 20th, and the jury retired to consider of their

verdict, and were still in such retirement on November 21st, when they sent the following note to the judge:

"Hon. Judge Fisher:

"The jury cannot agree as to the facts in the evidence of the gripman; also the boy's. We ask that we may have a transcript of the evidence of the above-named parties.

"Yours truly,

"W. S. BARTLEY,

"Foreman.

"P. S.—Without that I am satisfied this jury cannot agree.
W. S. B."

Upon receipt of this note the judge showed it to the counsel in the case, and said that he could not send a transcript of the evidence as desired, but that if the counsel would consent he would send for the jury and allow the stenographer to read to them the testimony of the witnesses referred to. The counsel for plaintiff said he would consent, but counsel for defendant refused. Afterward, on the same day, the judge sent for the counsel and informed them that he had concluded to allow the stenographer to read his notes of the evidence of the witnesses referred to to the jury, notwithstanding the objection, but the counsel for plaintiff said that he would not consent under those ¹⁵⁰ terms, and withdrew his consent, but the court, over the objection of counsel on both sides, had the jury brought in and the stenographer read from his notes as purporting to be the testimony of the gripman and the plaintiff, to which counsel on both sides duly excepted. The court offered to allow them to reargue the case, but they declined to do so, and the jury again retired.

There were elaborate instructions given which it will be unnecessary to copy here, because there is only one point in them of which there is any complaint, and that is the court refused to instruct the jury that "the servants of the defendant in charge of its car were bound to exercise a high degree of care in running and managing said car, so as to prevent the plaintiff from receiving injury whilst so riding upon the running-board of said car." The instructions given were to the effect that only ordinary care was demanded.

There was a verdict for defendant railroad company, which was followed by motions of plaintiff to set aside the nonsuit as to Moll, and for a new trial as to the railroad company, which being overruled, plaintiff has appealed. Since the ap-

peal was taken defendant Moll has died and the suit as to him abates.

1. The court did not err in refusing to instruct the jury that the defendant owed the plaintiff the duty of observing for his welfare the same high degree of care that it owed in respect to a passenger. The relation of the plaintiff and defendant to each other in this case was not analogous to that of the parties in the cases to which we are referred by the learned counsel for plaintiffs under this head: *Sherman v. Hannibal etc. R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Whitehead v. St. Louis etc. Ry. Co.*, 99 Mo. 263, 11 S. W. 751; *Buck v. People's Street Ry. etc. Co.*, 108 Mo. 185, 18 S. W. 1090. In all of those cases the person injured was on the train or car with the consent of the servant in charge, for the purpose of being ¹⁵¹ carried. The first two of those were cases in which the plaintiffs were injured while riding on freight trains on steam railroads, which fact alone would distinguish them from the case of a boy jumping on a street-car to sell newspapers and jumping off again while the car is moving. In the *Sherman* case the plaintiff, a boy thirteen years old, was stealing a ride on a freight train, and when he was discovered the brakeman told him that if he wanted to ride he must help brake, and gave him instructions, and the boy rendered help in that way, and at a station, at the brakeman's request, assisted in coaling, and the conductor knew he was being carried on the train under those conditions. It was held that he was entitled to be regarded as a passenger and to the same protection as if he had paid his fare. In the *Whitehead* case the plaintiff was also a lad of fourteen, who was riding in the caboose of a freight train under circumstances that indicated that he did not expect to pay any fare, but was riding free by the indulgence of the conductor, who knew he was there, and apparently consented to his remaining, and it was held that he was a passenger. The *Buck* case was one of a street railroad, and the plaintiff was a small boy who was taking a ride with the driver, who was in sole charge of the car. The child rode with the driver on the front platform, and the accident occurred after the car stopped to let him off, and while the driver was assisting him to alight. No fare was paid or expected, but the child was there by permission or invitation of the driver, and it was held that he was a passenger. In *Muehlhausen v. St. Louis Ry. Co.*, 91 Mo. 332, 2 S. W. 315,

the driver of a street-car, who seems to have been alone in charge of it, invited or permitted a lot of school children to get on the car and ride with him on the front platform, no fare being asked or expected; one of the children fell off, and it was held that he was a passenger.

¹⁵² These cases serve to illustrate the principle that pervades them, which is that when a carrier of passengers for hire knowingly receives in its car or other conveyance a person who comes in for the purpose of being transported, and the carrier enters upon the act of carrying him, the person while being so carried is a passenger, regardless of whether he has paid or is expected to pay his fare. This principle will include mail agents and newspaper venders in steam railroads traveling from one end of a route to the other. But a newsboy jumping on and off a moving street-car to sell his newspapers, not hailing to stop the car to receive him nor signaling to stop to allow him to alight, not asking or receiving permission either express or tacit, not asking or waiting for leave or license, but jumping on and off under circumstances that clearly indicate no purpose to pay fare and no aim to be transported, but only to avail himself of the presence of persons on the car likely to buy his papers, is in no sense a passenger, and the carrier is not under obligation to observe toward him the same degree of care that the law requires to be observed toward a person in the hands of the carrier to be transported. But the law does require of the carrier under such circumstances the exercise of ordinary care, and so the learned judge instructed the jury.

2. Appellant assigns for error the action of the trial court in allowing the defendant to read in evidence the affidavit as to what the witness Flippen would have sworn to.

The subject of continuances is treated minutely in our Code of Civil Procedure, aiming on the one hand not to compel a party to go to trial when he has done all that can reasonably be expected of him to procure the attendance of his witnesses, and yet a material witness whose testimony ¹⁵³ can be obtained is absent, and on the other hand guarding against an abuse of the practice of continuances. And in that connection it is provided (Rev. Stats. 1889, sec. 2127) that if "the court shall find the affidavit sufficient, the cause shall be continued, unless the opposite party will admit that the witness, if present, would swear to the facts set out in said affidavit, in which

event the cause shall not be continued, but the party moving therefor shall read as the evidence of such witness the facts so stated in such affidavit," etc. The purpose of that statute is very plain; it is to meet the emergency, to avoid delay, to give the party who is ready an immediate trial, and yet give the other party the benefit of the testimony of his absent witness in the only form available at the time. Ordinarily, a party is entitled to have his adversary produce his witnesses in court, to the end that they may be seen and cross-examined, and the waiving of that right is often no trivial matter. Besides, an affidavit drawn by a skillful lawyer is apt to be very much to the point and is very forceful as evidence. The law will allow it only because the emergency demands it, and the opposite party agrees to it only to avoid delay.

But in this instance, after the plaintiff made the admission which would authorize the affidavit to be read, the court of its own motion postponed the trial for a month and four days. The affidavit stated on its face that the witness resided in St. Louis, and could be produced at the next term, yet when more than a month was afforded the defendant before the trial would be called, no effort was shown to have been made to produce him, but the court suffered the affidavit to be read. The emergency under which the law would have allowed the affidavit to be read had passed, and the consideration which induced the plaintiff to make the admission had failed. This was a very material witness, professing ¹⁵⁴ to have seen the accident, and whose evidence professed to cover every point of the defense. The affidavit said of this witness that there was no other person whose evidence "could have been procured at this term of said court by whom he or it (affiant or defendant) can prove or fully prove the same facts." And the record shows that that was so.

The admission of a party under such circumstances to obtain a present trial does not stand for all time, but ceases when the emergency ceases. If it should be held to be binding a month later, there is no reason why it should not be so held six months later. A month is as long notice as is ordinarily given of the setting of a cause for trial; certainly, it is long enough to obtain the service of process for witnesses residing in the city, or to take their depositions if they are nonresidents, or at all events it is long enough to ascertain whether or not the evidence is attainable. The court erred in allowing the affidavit to be read over the plaintiff's objection.

3. Appellant also assigns for error the action of the court in requiring the stenographer to read his notes of the evidence to the jury.

The introduction of the official stenographer to take down the evidence in every case is of very recent date, and, so far as concerns his official duties, we must look to the statute creating the office to learn what they are. The statute declares his duties to be: "To take full stenographic notes of the oral evidence offered in every case tried in said court or division, and of all other proceedings when directed by the judge to be so reported, together with all objections to the admissibility of testimony and the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to finally deposit the same with the records of ¹⁵⁵ said court according to the directions of the judge thereof; and to furnish any person a longhand transcript of all or any required part of said evidence or oral proceedings upon the payment to him of the fees hereinafter provided. When not reporting in open court, it shall also be his duty to take such notes as may be requested by the judge in chambers, and to furnish the latter a transcript thereof when required": Rev. Stats. 1889, sec. 8228; Rev. Stats. 1899, sec. 10,106. Those are all the duties that the law prescribes for him, and whatever else he does is extraofficial. He is not made the umpire to decide disputed questions as to what the evidence was. Even in a bill of exceptions containing his transcript of his notes, the correctness of the evidence as set out is proven, not by his attestation, but by the certificate of the judge. It not infrequently occurs that a dispute arises between the parties as to the correctness of the stenographer's report of the evidence, and that dispute is not for him, but for the judge to settle. Assuming that he is honest and capable, and writes down the evidence as he understands it, still he is as liable to have misunderstood it as a juror or an attorney or the judge, and for that matter it may be said that the judge is as liable as anyone else to have misunderstood what the witness said, but the judge's understanding when it comes to the bill of exceptions must prevail, simply because it is necessary to leave the decision to some one, and the law has left it to him.

But the law guards with a somewhat jealous care the province of the jury, even from encroachment by the judge. The duty to hear and weigh the evidence and pronounce upon

its preponderance, the duty to find the facts from the evidence as it falls from the lips of the witnesses at the trial, is the peculiar office of the jury. The juror has a right, and it is his duty, to base his verdict on the evidence as he ¹⁵⁶ heard it, and he is not required, and should not be compelled, to yield his own memory and his own understanding of the evidence to that of another, even though that other professed to have taken notes. A juror's memory of the evidence at that stage of the case is as trustworthy as the stenographer's notes. The purpose of having the testimony taken down in shorthand is to preserve it for future reference after a period has elapsed during which it might not be so well remembered, and also for the convenience of the court who is called on to review the case or sign a bill of exceptions, not only after a considerable time may have elapsed, but also after he has tried, perhaps, a number of other cases, and his memory needs refreshing as to the details of the trial. But jurors who have nothing else to do until the particular case is ended, whose minds are presumed to be upon it, and who go to the juryroom with the testimony of the witnesses fresh in memory, do not need any such refreshing. They possess all that the law expects them to have upon which to base their verdict. If the memory of the juror is liable to be in error, or if in the confusion of the trial he may not have heard correctly what the witnesses said, he is in that respect no more liable to error or misunderstanding than anyone else engaged in the trial, and at that stage of the case, at least, the law has made it his particular province to decide what the evidence was, just as at a later stage it is the judge's duty to settle a disputed question of that kind. But while the jury is in the act of exercising its particular and exclusive office, its province should not be invaded.

It has been held that it is error to allow a juror to take notes of the evidence and carry them to the juryroom. This is for the reason that there is a danger that the jury give undue weight to the notes as against their own memories: ¹⁵⁷ Thompson and Merriam on Juries, sec. 390; Cheek v. State, 35 Ind. 492. And that it is error to furnish the jury with the notes of the evidence taken by the judge at the trial: Neil v. Abel, 24 Wend. 185; Mitchell v. Carter, 14 Hun, 448.

In Fleming v. Shenandoah, 67 Iowa, 505, 56 Am. Rep. 354, 25 N. W. 752, the jury sent a communication to the judge asking to have the stenographer sent to the juryroom to read the evidence to them, and the judge suffered it to be done.

The supreme court of Iowa held that to be error. That was a more flagrant violation of the rule of good practice than the action assigned for error in the case at bar, but the two cases on that point differ only in degree. It was not suggested in the Iowa case, nor is it suggested here, that the stenographer read the evidence incorrectly. His opportunity for doing so in the Iowa case without challenge was greater than in the case at bar, but the principle involved in such a practice is the same. It is not a question of the degree of prejudice in the particular case, which might be a difficult question to decide, but it is of establishing a rule of practice under which a juror may be unduly influenced against his own judgment and contrary to his own memory of the evidence. If the notes are read in the presence of the court and counsel, and a dispute as to their correctness arises, who is to settle it? If the judge should say that the notes are correct, and a juror, whose memory is clear to the contrary, should say no, which is to prevail, the notes or the juror's memory, so far as his vote and his influence on the verdict is concerned? The law has not provided rules to govern the trial of such an injected collateral issue, but the theory is that the jurors must settle such questions for themselves, and the judge should wait until the stage of the case is reached at which he may interfere if he thinks wrong has been done. ¹⁵⁸ In this case the learned judge should have adhered to his original purpose to allow the stenographer's notes to be read only on condition that counsel on both sides consented thereto. When this proposition was made the counsel for the plaintiff consented, but counsel for defendant refused to do so. The consent of the plaintiff's counsel was not that it might be done in spite of the defendant's refusal, but that it might be done with the consent of both. This was the judge's proposition. If the counsel for the plaintiff was of the opinion that it would be error to read the notes to the jury, without the consent of both sides, he would be not likely to consent to a transaction which if it should result in a verdict for him the verdict would be of no avail, but if for his adversary it would be valid. At all events, when the judge intimated that he would require the notes to be read in spite of the failure of counsel to agree to it, the plaintiff's attorney withdrew his consent and the notes were read with both sides objecting. However commendable the motive of the judge to prevent a mistrial, we cannot approve his decision on that point without

establishing a precedent that would lead to a dangerous practice.

4. It is insisted for defendant that the court should have given its instruction for a nonsuit on the ground of the plaintiff's contributory negligence. If the plaintiff had been a person of mature years the court would have held him guilty of negligence, but as he was a child of ten years, the question of his negligence was one for the jury.

Brace, P. J., concurs.

Robinson and Marshall, JJ., concur in the first, second, and third paragraphs, but dissent from the fourth paragraph, and for that reason the cause is transferred to court in Bank.

STREET RAILWAYS—PASSENGERS, WHO ARE NOT—CHILDREN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—One who attempts to board a moving street-car without indicating his intention soon enough to enable the person in charge to stop the car at a proper place is not a passenger; but it is the duty of street railway companies to prevent children entering their cars except under proper safeguards, and they are answerable for their negligence whether the children are passengers or not: See the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 96, 97, showing who are passengers. The question whether or not the mind of a boy ten years of age is sufficiently mature to make him answerable for his contributory negligence is a question of fact for the jury: Note to Pueblo etc. St. Ry. Co. v. Sherman, 71 Am. St. Rep. 123. Compare the monographic note to Barnes v. Shreveport etc. R. R. Co., 49 Am. St. Rep. 406-433, on negligence in dealing with children.

CONTINUANCE—ABSENT WITNESSES.—A continuance to procure witnesses is properly refused where little or no diligence has been exhibited in getting them: Note to Garza v. State, 73 Am. St. Rep. 934. A continuance will not be granted for the absence of a material witness, where a party has omitted to employ the means provided by law, when practicable, to enforce his attendance: Hensley v. Lytle, 5 Tex. 497, 55 Am. Dec. 741.

Stenographers' Notes as Evidence and the Right to Read Them to the Jury.

Nature of Notes—Want of Rule—Statutes.—Stenographers' notes are mere minutes of verbal testimony, which are of no intrinsic force: Seligman v. Ten Eyck, 53 Mich. 285, 18 N. W. 818. They are taken for the convenience of the parties: Phares v. Barber, 61 Ill. 271, 276; and are preserved, not for the benefit of the community at large, but of the parties to the action or proceeding in which they were taken. The information which they impart in criminal cases is not intrusted to the public, but, aside from the prosecuting attorney, is confined to the parties directly interested, and they are not public records: Smith v. State, 42 Neb. 356, 60 N. W. 595. The characters used in stenography cannot be said to be in the

English language: *Merrick v. State*, 63 Ind. 327. A stenographer's notes are subject to be modified in accordance with what may be judicially found to be the fact: *Taylor v. Preston*, 79 Pa. St. 436; *People v. Cox*, 76 Cal. 281, 18 Pac. 332; and those taken at a trial are not for the use of the jury, but of the judge: See the principal case; though it is not improper for counsel, in rehearsing the testimony to the jury, to use such notes when they are read as aids to his memory, and are according to his recollection: *Gwaltney v. Scottish etc. Timber Co.*, 115 N. C. 579, 20 S. E. 465.

The decisions concerning stenographers' notes as evidence present an incongruous mass of material, from which it seems difficult, if not impossible, to evolve any general rule, unless, perhaps, it is that such notes are not ordinarily admissible in evidence, for any purpose, outside of proving what an absent or deceased witness said at another or former trial, except by authority of law, that is, by virtue of some statute: *Reid v. Reid*, 73 Cal. 206, 14 Pac. 781; *Merrick v. State*, 63 Ind. 327, 335. Under the statutes of California, a stenographer's notes, when transcribed and certified as being a correct transcript of the testimony and proceedings, are, at the most, prima facie evidence only of such testimony and proceedings: Code Civ. Proc., sec. 273. This section of the code simply made the reporter's transcript prima facie "a correct statement of such testimony and proceedings." It did not say that the transcript should be legal evidence of any fact: *Reid v. Reid*, 73 Cal. 206, 14 Pac. 781; and the transcript was held simply to be prima facie evidence only in the court below; that is, whenever presented, it was open to question and possible correction: *People v. Woods*, 43 Cal. 176; *State v. Larkin*, 11 Nev. 314, 323; *People v. Cox*, 76 Cal. 281, 18 Pac. 332. Thus the notes of the reporter and his transcription of them in longhand were but prima facie evidence of the charge of the court: *People v. Cox*, 76 Cal. 281, 18 Pac. 332. A statute providing that a transcript of the stenographer's notes shall be prima facie evidence of the proceedings does not mean "absolute," and is not inconsistent with a statute requiring a certified and absolutely true statement of the evidence to be taken up in all proceedings in error: *Johns v. Adams*, 2 Wyo. 104, 198. Under a statute making a certified transcript of a stenographer's notes prima facie evidence of the proceedings had on a trial, the former testimony of an absent or deceased witness may be repeated at a later trial of a civil action, by admitting the reporter's transcript of the former testimony of the witness: *Merchants' Nat. Bank v. Stebbins*, 10 S. Dak. 466, 74 N. W. 190. "The theory," says Fuller, J., in the case last cited, "upon which courts admit such testimony in the absence of a statute like ours, authorizing the practice, is that stenographic reporters, charged with the duty of taking down all the testimony of the witnesses, together with the rulings of the court thereon, are

reliable agencies, whose transcripts are authentic, and, in case of subsequent absence or death of a witness, are of great value, and oftentimes the best evidence of which the case, in its nature, is susceptible": *Merchants' Nat. Bank v. Stebbins*, 10 S. Dak. 406, 74 N. W. 199. But where the statute makes no provision for the certification by a stenographer of the proceedings of the district court, it has been held that a transcript of his notes, although accompanied by a formal certificate, is not admissible as independent evidence: *Smith v. State*, 42 Neb. 356, 60 N. W. 585, explaining *Spielman v. Flynn*, 19 Neb. 342, 27 N. W. 224; and that his report of the testimony of a witness examined in such court, although duly certified, is not admissible as evidence in a future action between the same parties, as documentary or independent evidence: *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731.

Proof of What an Absent or Deceased Witness Said at Another or Former Trial.—The testimony of a witness taken at a former trial of the same case between the same parties may be read in evidence from the stenographer's notes if such witness is absent from the state: *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752; *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; but see the comments on this case in *Smith v. State*, 42 Neb. 356, 60 N. W. 585, cited *supra*. Under the statute of Georgia, if a stenographic report of the testimony of a witness, who was sworn upon a former trial, but who has since died, is offered in evidence, all of such testimony which is relevant and material should be received; and while the party offering it is not bound to read the entire testimony, those portions of it not read by him may be read by the opposite party as evidence introduced by him who first offers it. Hence, if the state, in a criminal case, reads to the jury the direct examination of such witness, the defendant is entitled to have the cross-examination read, but he may waive his privilege, though he cannot, by his failure to read such examination, deprive the state of the testimony to which it is entitled: *Waller v. State*, 102 Ga. 634, 28 S. E. 284.

The reproduction of the testimony of a witness in a criminal case who was examined on a former trial is said not to be a violation of the fundamental rule that the accused has a right to be brought face to face with the witnesses against him. It has, therefore, been held that there is no error in permitting the official stenographer to read from his report of the testimony of a witness given on a former criminal trial, who has since died: *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Jackson v. State*, 81 Wis. 127, 51 N. W. 89; *People v. Sligh*, 48 Mich. 54, 11 N. W. 782. *Contra*, *People v. Quirise*, 59 Cal. 343; *People v. Chung Ah Chue*, 57 Cal. 567; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, cited *infra*. And in civil cases, a stenographic report of the testimony given on a former trial may be admitted in evidence, where the report is complete and proved to be correct; where the

witness was fully examined and cross-examined; where his testimony is otherwise unobjectionable; and where the personal attendance of the witness cannot be secured by reason of his being out of the jurisdiction or beyond the process of the court: *Chicago etc. Ry. Co. v. Myers*, 80 Fed. 361, 365; *Omaha St. Ry. Co. v. Elkins*, 39 Neb. 480, 58 N. W. 164; *Minneapolis Mill Co. v. Minneapolis etc. Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *King v. McCarthy*, 54 Minn. 190, 55 N. W. 960; *Stewart v. First Nat. Bank*, 43 Mich. 257, 5 N. W. 302; especially where prior notice has been given that the stenographer's notes will be offered in evidence: *Fleming v. Shenandoah*, 71 Iowa, 456, 32 N. W. 456; but if the testimony of the witness is incomplete, it cannot be admitted: *Chicago etc. Ry. Co. v. Myers*, 80 Fed. 361. It has even been held that a stenographer's notes of testimony given on a former trial are admissible in a subsequent action although the deposition of the witness himself has since been taken: *Labar v. Crane*, 56 Mich. 585, 23 N. W. 323. It should be observed, in connection with what is said above, that the authorities are conflicting upon the general question as to whether the testimony of a witness given upon a former trial of the same case is admissible in evidence, simply upon a showing that the witness is out of the jurisdiction and beyond reach of the court's process. Some cases directly favor the admission of the evidence, but others are in favor of excluding it: See cases cited in *Omaha St. Ry. Co. v. Elkins*, 39 Neb. 480, 58 N. W. 164. Nor should it be overlooked that some courts, in considering the admissibility of such testimony, have recognized the distinction between criminal and civil cases, growing out of the constitutional guaranty that a person accused of crime shall be confronted by the witnesses against him: *Finn v. Commonwealth*, 5 Rand. 701. There is no question about the testimony of a deceased witness upon similar issues between the same parties being admissible in a civil case. Hence, a stenographer's transcript of testimony given on a former trial of the same case by a deceased witness is admissible in evidence, under the Vermont statute, which makes a transcript made by a stenographer evidence, though the witness was dumb, and the signs made by him were described by the stenographer in words: *Quinn v. Halbert*, 57 Vt. 178, 183.

In Arkansas it is held that the testimony of a witness in a criminal case, given on an application for bail, reduced to writing and subscribed by the witness, may be read on the final trial, if the accused met the witness face to face on such application, and the witness on the trial is out of the jurisdiction, or his whereabouts cannot be learned: *Sneed v. State*, 47 Ark. 180, 1 S. W. 68. In California it has been held that a stenographer's transcribed notes of the testimony of a witness given on a former trial in a civil case are admissible in evidence on a subsequent trial, where it is shown that the witness is out of the state: *Clidester v. Consolidated Ditch Co.*, 50 Cal. 197; and although such transcript was not signed

by the witness, if no objection is made to this mode of proving his testimony: *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; but the reporter's notes in a criminal case of the testimony given by a witness on a former trial thereof are inadmissible in evidence, though the witness is shown to be out of the state: *People v. Chung Ah Chue*, 57 Cal. 567, commenting on *People v. Devine*, 46 Cal. 48, to the contrary; or is shown to be dead: *People v. Qurise*, 59 Cal. 343; for the defendant in a criminal action is entitled, under the statute of California, to be confronted with the witnesses against him, etc.: *People v. Chung Ah Chue*, 57 Cal. 567; *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Gardner*, 98 Cal. 127, 32 Pac. 880; with the single exception that his deposition, properly taken at a preliminary examination, may be read, as provided by statute: *People v. Gardner*, 98 Cal. 127, 32 Pac. 880. This matter will be noticed further on. Hence, as the testimony of a witness taken by a stenographic reporter at a former criminal trial, and transcribed by him, is inadmissible and absolutely incompetent on a second trial, at which time the witness is absent from the state, such evidence is subject to the general objection that it is incompetent, immaterial, and irrelevant: *People v. Gordon*, 99 Cal. 227, 33 Pac. 901.

A stenographer's notes of testimony given on a former trial are not admissible in evidence where they have not been authenticated by the oath of the reporter or otherwise. It must, at least, be proved that they are accurate and authentic, in order to let them in, when otherwise properly admissible: *Misner v. Darling*, 44 Mich. 438, 7 N. W. 77; *People v. Sligh*, 48 Mich. 54, 11 N. W. 782; *Breitenwischer v. Clough*, 116 Mich. 340, 74 N. W. 507; *Jackson v. State*, 81 Wis. 127, 51 N. W. 89. If the stenographer is not sworn, his notes are not "properly proven notes of the examination," as required by the Pennsylvania statute: *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222. But if he is sworn, and testifies that, while he does not recollect the fact, yet he thinks he took down all the questions put to the witness, and his answers, and that he believes they were substantially correct, such testimony is sufficient to authorize the admission of his notes in evidence, in a case where they would be admissible if correct and authentic, as in reproducing the testimony of a deceased witness given on a former trial: *Jackson v. State*, 81 Wis. 127, 51 N. W. 89. A shorthand report of the testimony of a witness given on a former trial in a civil case, even where it is competent evidence, upon a proper showing of the witness' inability to be present at the second trial, should be excluded where such preliminary proof is insufficient: *Edwards v. Edwards*, 93 Iowa, 127, 61 N. W. 413. It cannot be read in evidence when the witness is alive and present in court: *Byrd v. Hartman*, 70 Mo. App. 57; *Dempsey v. Lawson*, 76 Mo. App. 522; or is within the state and therefore not out of the jurisdiction: *Meyer v. Roth*, 51 Cal. 582. Recitals made by a stenographer,

in his minutes of a habeas corpus proceeding, are not admissible to prove the facts so recited, in an action brought by the petitioner's attorney to recover for his services: *Williams v. Lewis*, 13 App. Div. 130; 43 N. Y. Supp. 255.

Impeachment or Contradiction of Witnesses.—Under the code of Georgia, the official stenographer's report, proved by him to be correct, although he may not remember the testimony, is competent evidence in another case of what a witness swore upon the trial at which the report was made, in so far as the same may be pertinent and otherwise competent; and in a criminal case the state may read in evidence a part of such report without putting in the whole, the other party being at liberty to introduce the remainder, or so much thereof as is pertinent: *Burnett v. State*, 87 Ga. 622, 13 S. E. 552. In the case last cited, the state offered a portion of the testimony of the witness delivered upon a former trial, for the purpose of impeaching his statement: See *Waller v. State*, 102 Ga. 684, 28 S. E. 284. So if one party offers extracts from the testimony of a witness at a former trial in a civil case for the purpose of contradicting him, the other party is entitled to put in so much of the remainder as is relevant, and for that purpose may call the stenographer and have him read his original notes: *Noyes v. Gilman*, 71 Me. 394. In a murder case a witness, D., was introduced by the defendant for the purpose of impeaching B., a witness for the prosecution. D. narrated what B. had sworn to on a former trial in reference to certain points. The reporter's notes of a portion of B.'s testimony on the former trial, after being first authenticated as correct by the reporter's oath, was read in evidence for the same purpose. Subsequently, the prosecution, for the purpose of contradicting D.'s evidence, was, against the defendant's objection permitted to read in evidence that portion of the reporter's transcript of B.'s evidence involving the points as to which D. had testified. In this the court thought that there was no error: *People v. Morine*, 61 Cal. 367.

There are cases, however, which deny that a stenographer's transcript of the testimony of a witness given on a former trial can be read for the purpose of contradicting the witness on a subsequent trial, especially where the legislature has not declared that such reports shall not be evidence for any purpose: *Phares v. Barber*, 61 Ill. 271, 276. Such a transcript, although certified by the stenographer as being correct, is not admissible, under the California statute, even in a civil case, for the purpose of contradicting the defendant's testimony upon a material point in a former suit: *Reid v. Reid*, 73 Cal. 206, 14 Pac. 781. A stenographer's notes can no more be used for impeaching purposes than if they did not exist, until the witness to be impeached has first been interrogated. Hence, it is error to allow a stenographer to testify, for the purposes of impeachment, to detached portions of testimony given by a witness on a former trial, but to which his attention has not been

called: *Seligman v. Ten Eyck*, 53 Mich. 285, 18 N. W. 818. A stenographer's notes of a party's testimony in a civil case cannot, it has been held, be used to contradict him on a subsequent trial of the same case, unless they are introduced by consent, particularly if they are not authenticated: *Edwards v. Heuer*, 46 Mich. 95, 8 N. W. 717; and a former bill of exceptions containing a statement of a witness' testimony is inadmissible to impeach him unless it has the sanction of an oath. "It is usual to call the stenographer, and prove the statements made upon his oath": *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372, 69 N. W. 88, per Hooker, J. So, independently of the stenographer his notes have no standing in the courts of the state of Washington in criminal cases: *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332, holding that such notes of evidence, taken at a former trial, are inadmissible in evidence to impeach a witness on the second trial concerning matters alleged to have been testified to by him at such former trial. But in Iowa, where a proper foundation is laid, evidence taken in shorthand on the trial of a defendant for an assault to commit great bodily injury on the plaintiff, is admissible in a civil action for assault and battery, involving the same assault, for the purpose of impeaching a witness, if he was fully cross-examined on the criminal trial, and the stenographer who took the notes, testifies at the civil trial as to what the witness said in the criminal trial; and the presumption is that the proper foundation was laid: *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059. And in Michigan the stenographer's minutes of the testimony of a defendant saloon-keeper, prosecuted for the drunkenness of one to whom he had sold liquor, are admissible, after a proper foundation has been laid, in an action, under the civil damage act, brought by the wife of the person convicted of drunkenness against such saloon-keeper: *Lucker v. Liske*, 111 Mich. 683, 70 N. W. 421.

Stenographers as Witnesses.—An official stenographer may, of course, testify from recollection as to statements made by a witness at a former trial reported by him, and he may use his stenographic notes to refresh his memory: *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78; *State v. George*, 60 Minn. 503, 63 N. W. 100; *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *Kellogg v. Schenerman*, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237; though such notes would not of themselves be competent evidence as to the statements made by the witness, considered as independent evidence: *Lyon v. Brown*, 31 App. Div. 67; 52 N. Y. Supp. 531; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731. The court stenographer, however, is not the only competent witness in such cases, as the testimony of a witness at a former trial may be proved by the testimony of anyone who heard it: *Brice v. Millier*, 35 S. C. 537, 15 S. E. 272; *State v. McDonald*, 65 Me. 466; *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; especially if the witness took

the testimony in shorthand: *Rounds v. State*, 57 Wis. 45, 14 N. W. 865; *Moore v. Moore*, 39 Iowa, 461. A court stenographer, who has correctly taken the testimony of a witness, may testify from his shorthand notes, upon a subsequent trial, although he has no independent recollection of such testimony, and can relate it only by reading his notes thereof: *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444; *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Stahl v. Duluth*, 11 Minn. 341, 74 N. W. 143. In a prosecution for perjury where all that is sought to be proved is the mere fact that certain testimony was given upon the trial in which the alleged perjury was committed, and the defendant is confronted by the witnesses who testify as to such fact, his objection that the evidence is incompetent, irrelevant, and immaterial, because he was not present when such testimony was given and had no opportunity to examine or cross-examine the witnesses, is unavailing. Hence, if the court stenographer, in the trial wherein the alleged perjury was committed, is sworn as a witness upon the trial for perjury, and testifies as to having taken notes of the former trial, and that they are correct, there is no error in permitting him to read the testimony from his notes, subject to cross-examination: *People v. Lem You*, 97 Cal. 224, 32 Pac. 11. And a person who takes down in shorthand statements made by a defendant, shortly after his arrest, to the district attorney, may be permitted to read in evidence his transcription of the statements made, and may refresh his memory by a reference to his notes: *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15. But while a court stenographer may use his notes to refresh his memory, he should not be permitted to read them in their entirety to the court or jury: *Kellogg v. Scheuerman*, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237. A court stenographer may testify as to what a witness swore to on a former trial, though the witness is within the jurisdiction, but it is not the best evidence: *Kellogg v. Scheuerman*, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237; but in New Mexico it is held that, where a witness is out of the territory, but his whereabouts are known, and no reason appears as to why his deposition was not taken, the testimony of the official stenographer, who refreshes his memory from his notes taken at a former trial, as to what the witness had said, can be regarded only as hearsay, the statute having failed to declare the legal value of the notes as evidence: *Kirchner v. Laughlin*, 5 N. Mex. 365, 23 Pac. 175. A court stenographer's testimony, based upon his notes, is incompetent to prove the testimony of a witness given in a foreign language at a former trial, and taken down by the reporter from the interpreter. Hence, he should not be permitted to read his shorthand notes to the jury, where it is evident that he did not understand the language in which the witness spoke, and does not pretend to testify from his own knowledge or recollection of what the witness said, but from the shorthand notes of what the interpreter

had said. In such a case the interpreter, or some other witness who heard and understood the language in which the statements of the witness were made, should be called to prove them: *People v. Ah Yute*, 56 Cal. 119.

Notes as Depositions.—A stenographer's notes are in no sense depositions or evidence of record: *Seligman v. Ten Eyck*, 53 Mich. 285, 18 N. W. 818; *Edwards v. Heuer*, 46 Mich. 95, 8 N. W. 717; and if the stenographer is not sworn, his notes are not properly proved: *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222. But in California a transcript of the stenographer's notes in a criminal case, certified as provided by the statute, is placed upon the same footing as a deposition, and is admissible in like cases: *People v. Grundell*, 75 Cal. 301, 17 Pac. 214. There is, however, no statutory provision in that state placing reporters' transcripts in civil cases upon the footing of depositions: *People v. Grundell*, 75 Cal. 301, 17 Pac. 214. A deposition in a civil cause must be taken, subscribed, and certified as prescribed by the code, else it cannot be considered upon the subsequent trial of the case. Hence, if stenographic notes are taken of the testimony of witnesses, but are not read over to them, or corrected or signed by them, or certified by the reporter or by any other person, such notes lack the essential elements of a deposition, and an uncertified transcript of them is not admissible in evidence upon the trial: *Thomas v. Black*, 84 Cal. 221, 23 Pac. 1037. But if an attempt has been made to take a deposition in a civil case, and the testimony has been transcribed by a stenographer, but the witness either neglects or declines to subscribe the same, the reporter, if called as a witness on the trial, may refresh his memory from the writing, and will be permitted to read his notes to the court, though he has no definite and well-defined recollection of the statements made independent of his notes: *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444. If oral testimony upon a criminal trial is reported by a stenographer and read to a grand jury by him, his notes are not a deposition within the meaning of a statute requiring the name of a witness, whose deposition was given to the grand jury, to be inserted at the foot of the indictment or indorsed thereon: *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129. The code of Iowa provides that a transcript of the evidence preserved by the shorthand reporter may be admitted in evidence "with the same force and effect as depositions, and subject to the same objections, so far as applicable." But depositions containing the evidence of witnesses, or copies of documents, cannot be introduced in evidence without excuse for not producing the witness in court, or for not producing the original document: *Case v. Blood*, 71 Iowa, 632, 33 N. W. 144. A deposition taken in shorthand must be fully written out in longhand, read by or to the witness, and signed by him, before it can be received in evidence: *Zehner v. Lehigh etc. Nav. Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 580, 41 Atl. 464; *In re Cary*, 9 Fed. 754.

Under the California statute, a defendant in a criminal case is entitled to be confronted with the witnesses against him in the presence of the court, with the single exception that the deposition of a witness properly taken at a preliminary examination may be read, upon its being satisfactorily shown to the court at the time of trial that he is dead or insane, or cannot, after due diligence, be found within the state. When the testimony is taken in shorthand, the statute requires that the reporter shall transcribe it and certify that his transcript is "a correct statement of such testimony." Such certificate is essential to the competency of the transcript as evidence against the accused. The reporter must also file the transcript, but the statute does not require it to be signed by the witness. As a substitute therefor, it requires the reporter to certify that it is a correct "statement" of the testimony: *People v. Gardner*, 98 Cal. 127, 32 Pac. 880; *People v. Ward*, 105 Cal. 652, 39 Pac. 33; *People v. Grundell*, 75 Cal. 301, 17 Pac. 214. The stenographer's certificate to the deposition that the same is "a correct transcript of the examination in the above-entitled case" has been held a sufficient certification to make the deposition prima facie evidence: *People v. Riley*, 75 Cal. 98, 16 Pac. 544; but the statute is not satisfied by the reporter's certificate that his transcript is a "true copy of the testimony," especially where the transcript does not have the title of any court or cause in which the testimony was taken: *People v. Ward*, 105 Cal. 652, 39 Pac. 33; or that it is a full, true, and correct transcript of the shorthand notes: *People v. Carty*, 77 Cal. 213, 19 Pac. 400. The certificate must be correctly written, and its absence cannot be supplied by parol evidence so as to make the transcript admissible, but the reporter, if called as a witness, may refresh his memory from it, and testify as to what occurred at the examination: *People v. Carty*, 77 Cal. 213, 19 Pac. 400. It is error, however, to admit in evidence the testimony of a stenographer as to the evidence given by a witness upon a preliminary examination, after the witness' deposition has been rejected because of a defective certificate, although it is shown that, after due diligence, the witness cannot be found within the state: *People v. Gardner*, 98 Cal. 127, 32 Pac. 880. A statute making stenographic notes, taken before a committing magistrate upon a preliminary examination, prima facie evidence of the testimony given, does not make such notes admissible where the testimony was taken through an interpreter: *People v. Lee Fat*, 54 Cal. 527.

Unauthenticated notes of testimony taken by a stenographer at a coroner's inquest, not proved to be correct, or even in the same condition as they were left in by him at the close of the inquest, are not admissible as the best evidence of what occurred thereat. The deposition of a witness taken by the coroner and reduced to writing by him, and filed as provided by statute, is the best evidence: *Overtoom v. Chicago etc. R. R. Co.*, 80 Ill. App. 515. Such notes made on a preliminary examination or an inquest, and after-

ward written out by the reporter, but which were not made by or under the direction of the magistrate, nor signed by the witnesses, are inadmissible, on a subsequent trial, as record evidence. They are mere memoranda from which the stenographer may refresh his memory: *Rounds v. State*, 57 Wis. 45, 14 N. W. 865.

STATE v. ASSOCIATED PRESS.

[159 Mo. 410, 60 S. W. 91.]

MANDAMUS—DEMAND PRECEDING APPLICATION.—It is indispensable to the granting of a writ of mandamus that there should be a prior express and specific demand by the relator of what he seeks; and it should also be shown that the defendant has it in his power to perform the act.

MANDAMUS IS NOT A REMEDY TO COMPEL THE MAKING OF A CONTRACT, and will not issue for such a purpose, particularly where the performance of the contract involves, and requires for a long time, the exercise of judgment, continuous supervision, special experience, and business discretion, as where a publishing company seeks a daily news service to be rendered to it by a news gathering association.

CONTRACTS.—PRICE IS ESSENTIAL to a contract, and without this agreed upon no contract exists.

CORPORATIONS — ASSOCIATED PRESS — ABDICATION OF POWERS.—A corporation may abdicate all rights conferred upon it. Hence, an incorporated news association may so amend its charter as to eliminate power conferred in the original charter to conduct a telegraph and telephone business and to exercise the right of eminent domain.

POLICE POWER—GOVERNMENTAL CONTROL OF PROPERTY OR BUSINESS—WHEN PERMISSIBLE.—It is only on the basis of the exercise of the police power, and that exercise based on certain exceptional conditions, that a person who has dedicated his property to a public use, or who is engaged in some quasi public business and enjoying some privilege or immunity incident to such business, can be brought under governmental control in relation to such property or business and its regulation.

POLICE POWER—COMPENSATION FOR USE OF PROPERTY—INFLUENCE OF.—REGULATIONS which the state, in the exercise of its police power, authorizes with respect to the use of property, are entirely independent of any question of compensation for such use. The question of compensation has no influence in establishing them.

STATES—REGULATION OF BUSINESS BY ASSOCIATED PRESS—MONOPOLY.—The mere fact that incorporation has been granted to a company, such as the Associated Press, to pursue the lawful calling of gathering and disseminating news, does not, and cannot, of itself give the state a right to regulate what before incorporation was but a natural right, especially where the company has no monopoly and has been granted no special or exclusive rights or privileges by the state.

MONOPOLIES.—A COURT WILL NOT ADD ONE MORE MONOPOLIST to a monopolistic organization, because that would not lessen its monopolistic features or abate its vicious tendencies.

MONOPOLIES—ASSOCIATED PRESS COMPANIES ARE NOT.—There is no basis laid for the fact or the charge of a monopoly unless there is "property" to be "affected with a public interest." Hence, the business of the Associated Press, in gathering and disseminating news, is not a monopoly, for the business is one of mere personal service—an occupation.

MANDAMUS.—A COURT WILL NOT AWARD A DISCRETIONARY WRIT of mandamus for the mere purpose of determining an empty and barren technical right in behalf of a petitioner.

THE LEGISLATURE MAY DECLARE THAT A BUSINESS has become impressed with a public use, but the courts cannot do so.

THE ANTI-TRUST LAWS of Illinois are not of force in Missouri, and those of the United States must be enforced in another forum. The anti-trust laws of Missouri do not apply to the business of the Associated Press.

Seymour D. Thompson, William J. Stone, and Nathan Frank, for the relator.

Boyle, Priest & Lehmann, R. E. Ball, and F. N. Judson, for the respondent.

418 SHERWOOD, J. The object of this original proceeding is to compel respondent, the Associated Press, to furnish to the Star Publishing Company for publication in its newspaper, "The Star," the budget of news collected daily by respondent, and also its Saturday night news reports.

Relator avers tender of a sum above that for which other papers of St. Louis are served by respondent with such news, and also avers demand made on respondent for furnishing to it its Sunday morning reports as per contract, and for such daily news reports, and its refusal to furnish the same.

Relator also alleges: "That the relator herein now is and has been for a long time past, to wit, for the period of six months, ready and willing to enter into a proper contract with the said Associated Press to receive and pay the reasonable charges of the said Associated Press, not only for its Saturday night news reports, but also for its daily news reports, and to comply with all the terms and conditions which the said Associated Press imposes upon its other publishers of daily English newspapers in the city of St. Louis receiving such news reports."

419 But there is no averment that relator demanded of respondent to enter with it into such "proper contract," nor that respondent refused to enter into such a contract, nor in what

such a contract would consist, although the mandate of the alternative writ commands, "that you do serve this relator, the Sayings Company, at the city of St. Louis, state of Missouri, with your regular afternoon news reports, and with your regular Saturday night news reports, the same being the reports which you serve at said city to the Pulitzer Publishing Company under your subsisting contract with the said company, upon the payment to you by said relator of the same just and reasonable charges for said news reports which you receive from said Pulitzer Publishing Company, and upon compliance with such reasonable agreement in that behalf as you shall make with this relator, and with such reasonable by-laws, rules, and regulations as you have made or shall have made in that behalf, and that you continue so to furnish this relator with your said daily afternoon news reports and your said Saturday night news reports so long as this relator shall comply with the contract made between you and it in that behalf."

The substance of the issues presented by the pleadings of the parties to this litigation has been very well condensed by counsel for respondent, and we adopt such condensation.

Relator asserts: 1. That it has a contract with the Associated Press for the Sunday morning news; 2. That the gathering of general news for publication in a daily newspaper is a public employment, which must be exercised by those who engage in it for all publishers of dailies who may desire it, upon equal terms and without discrimination; 3. That the Associated Press has by its charter assumed this public employment and so is bound to exercise it on behalf ^{also} of the relator, upon tender of compensation equal to that paid by other publishers similarly situated and receiving a similar service; 4. That the Associated Press has broken down all competitors and secured a monopoly of the business of news-gathering, in consequence of which it is not practicable to publish a daily newspaper without the aid of its service; 5. That the Associated Press has been granted telegraph and telephone franchises by the states of Illinois and Missouri, and also possesses the power of eminent domain; 6. That the by-law of the Associated Press which makes the consent of existing members a condition of admitting new members in any locality is in violation of the anti-trust laws of Missouri, Illinois, and the United States.

The respondent, on the other hand, asserts: 1. That it never made any contract with the relator; 2. That the gathering of news, whether for daily newspapers or for other publications,

is a purely private business requiring for its conduct no public franchises or privileges; 3. That while the Associated Press is in form a corporation for pecuniary profit, in its substance it is but a voluntary association of publishers of newspapers who have combined their energies for the sake of greater efficiency and economy in news-gathering; 4. That it has not, and cannot, possibly monopolize the business of news gathering; and that in fact there are now other general news-gathering agencies in successful operation in the United States; 5. That it does not own or operate telegraph or telephone lines, and has no means for the transmission of news except such as are open to everybody on like terms; 6. That it has never exercised and does not possess the power of eminent domain; ⁴²¹ 7. That it is not a trust in any sense, nor is there anything unlawful in its methods or aims, since the combination which it accomplishes among its members has exclusive reference to a matter of internal economy and leaves the members unaffected and unrestrained in so far as concerns their relations to the general public; 8. That its business is national and international in its scope and character, and so is protected against state interference by various provisions of the federal constitution which are cited.

1. It is fundamental in the law of mandamus that it is indispensable to granting the writ that a prior express and specific demand be made of respondent of that which relator seeks, and that a refusal of such demand occur before relator has any standing in court, or his application for the writ contains any ground for relief: Tapping on Mandamus, 282; 2 Spelling on Extraordinary Relief, sec. 1381; and it should also be shown that defendant has it in his power to perform the act: Moses on Mandamus, 204; High on Extraordinary Legal Remedies, 3d ed., sec. 13; 14 Am. & Eng. Ency. of Law, 1st ed., 106.

Mandamus is never granted in anticipated omission of a duty. An actual omission of duty must have occurred before application for the writ is made: High on Extraordinary Legal Remedies, 3d ed., sec. 12. Here there is no averment that relator even attempted to enter into "a proper contract" with respondent, saying nothing as to what those words mean.

Not only must the petition for the alternative writ contain such specific allegations as to prior demand, met by a refusal, but the judgment, if for relator, must be equally specific both as to the rights of the plaintiff and the obligation imposed on the defendant: Price v. Riverside etc. Co., 56 Cal. 431. If the

petition for the writ be defective as aforesaid, the defect is a fatal one: *Price v. Riverside etc. Co.*, 56 Cal. 431.

⁴²³ If defendant is not in default about agreeing to make an undefined contract with plaintiff, then this court has no basis on which it can act, and therefore can enter no valid judgment on this point: *Price v. Riverside etc. Co.*, 56 Cal. 431.

Again, the allegations of a "reasonable agreement" or "proper contract" in the alternative writ are too vague and indefinite to base the judgment of a court upon. What is a "proper contract," or what a "reasonable agreement"?

2. But in addition to the points above, courts will not by mandamus compel the making of a contract, because, in such case, the element of the specific act to be performed must be wholly lacking: *People v. Dulaney*, 96 Ill. 503. Nor has a court any authority to compel the performance of executory contracts: *People v. Dulaney*, 96 Ill. 503. See, also, *Atchison etc. R. R. Co. v. Denver etc. R. R. Co.*, 110 U. S. 667, 4 Sup. Ct. Rep. 185; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 628; *Wisconsin etc. R. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115.

Besides, a contract of the kind in contemplation must necessarily involve and require for a long time the exercise of judgment, continuous supervision, special experience, and business discretion: *Wisconsin etc. R. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115; 14 Am. & Eng. Ency. of Law, 104; *People v. Dulaney*, 96 Ill. 503; High on Extraordinary Legal Remedies, 3d ed., secs. 25, 28; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449.

The case last cited strongly bears on, and affords apt illustration of, the principle now under discussion as well perhaps as others involved in this case. The Iron Age Company had contracted with the New York Associated Press, whereby it asserted the exclusive right to receive and to publish at Birmingham, Alabama, the daily news reports of the New York association. The Iron Age Company complained of a breach of this contract for that the Western Union Company gave those reports to two other daily papers in Birmingham. On this basis of fact the Iron Age Company prayed injunction ⁴²³ for specific performance. But this relief was denied, the court saying: "We have seen that the duty involves the exercise of special skill, judgment, and discretion, being intellectual as well as mechanical in their character. These duties are also continuous in their nature and of indefinite duration," and that

the court could not "superintend the continuous performance of these duties."

3. The same line of remark and of authorities would be applicable to by-law 7 had it been enacted for the benefit of relator, which is clearly not the case. Under that by-law relator asserts that it is entitled to the service of news for its Sunday edition under an existing contract with the United Press. But that by-law, which respects the admission of members, only allows the admission of new members upon the affirmative sanction of a majority of the board of directors. This sanction has not been obtained, nor is it asserted that it has. But had the by-law been enacted for relator's express benefit, it lacks a great deal of being a contract in its favor. It fixes no compensation to be paid, nor any other terms which go to make up a contract between the respondent and its members. Price is as essential as any other of the terms of a contract, and without this agreed upon no contract exists: *Kelly v. Thuey*, 143 Mo. 435, 45 S. W. 300.

And, as before stated, mandamus does not lie to compel parties to contract with one another; it would be wholly foreign to the nature and attributes of such a writ which issues only for the enforcement of a clear and specific legal right, which right has been omitted to be granted by one whose duty it was to grant it. Until the party whose duty it was to grant such right makes default, mandamus does not lie.

4. In so far as relates to respondent being possessed by its original charter of a right to conduct a telegraph and telephone business, it never exercised that authority, and therefore ⁴²⁴ did not require the right of eminent domain; that right lay dormant. But whether exercised or not, the charter having been so altered by amendment as to eliminate those rights, the case stands here as if such rights had never been existent. If, as all the authorities concede, a corporation may abdicate all the rights conferred upon it and go out of business altogether, then no difficulty can occur in its abdicating a portion of those rights. What is true of the integer of rights must needs also be true of each of its component fractions; the greater includes the less.

5. These remarks bring up for discussion the main issue in this cause, in which the doctrine announced in *Munn v. Illinois*, 94 U. S. 113, is relied on by relator. That case has never received the entire sanction of the legal profession, nor indeed

the entire concurrence of all the members of the two courts which announced the decision.

Two dissents were entered at the time the majority opinion was delivered, Mr. Justice Field writing the minority opinion, marked by his accustomed ability, and concurred in by Mr. Justice Strong. And there were two dissents also entered in the state supreme court: *Munn v. People*, 69 Ill. 80.

Since then there have been various limitations to the doctrine suggested by various judges who concurred in the original opinion and subsequently pointed out what they understood the opinion to mean, and what they meant by their concurrence. And in subsequent cases there have been dissents which have gone in direct opposition to the ruling in that case. Thus, in *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468, Brewer, Field, and Brown, JJ., dissented, while in *Brass v. Stoeser*, 153 U. S. 391, 14 Sup. Ct. Rep. 857, Brewer, Field, Jackson, and White, JJ., dissented.

Munn's case, in brief, was this: The constitution of Illinois, adopted in 1870, contained a provision which converted every warehouse in which grain or other property was ⁴²⁵ stored for a compensation into a public warehouse. Thereupon, the legislature of the state of Illinois in 1871 passed an act concerning warehouses in cities having a population of not less than one hundred thousand inhabitants. This act fixed a maximum charge for the storage and handling of grain, and made it a crime to fail to take out license to do business as a public warehouseman. *Munn & Scott*, a private and unincorporated firm, owning a private warehouse and refusing to take out a license, were prosecuted, found guilty and fined, and on appeal taken the judgment was affirmed in the state supreme court (*Munn v. People*, 69 Ill. 80), and afterward in the supreme court of the United States. The act in question was held not obnoxious to any provision of the constitution of the United States, and particularly to the fourteenth amendment to that instrument, providing that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The authorities cited in the opinion of the latter court, and we say it with due deference, scarcely warrant the conclusion reached. Thus, Hale, as quoted, in his treatise *De Portibus Maris*, says: "A man for his own private advantage may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for crantage, wharfage, housel-

lage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the king, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for crannage, wharfage, pesage, etc.; neither can they be enhanced to an immoderate ⁴²⁶ rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by the public interest."

In the first part of the quotation distinct and express recognition is given to the fact that private wharfs were in abundant existence in Hale's time, and were, if remaining private, unrestricted in their charges. In sharp antithesis to the case of the owner of a private wharf stands that of one, be he king or subject, who has in operation a public wharf. The reason of this is that "in England it hath always been holden, that the king is lord of the whole shore" (1 Cooley's Blackstone, 264), and being thus lord (and as Judge Cooley suggests) the title to the soil under the navigable water in England being invested in the crown, therefore such wharves can only be erected by express or implied license, and by making use of the public property in the soil. In such circumstances, then, the result naturally followed that such wharf was "affected with a public interest," since it was public property, used either directly or indirectly by public permission, and, of course, subject to such terms as the sovereign might impose.

And the same rule would hold where the owner makes a dedication of his otherwise private wharf to the public use. In either case of erection by public permission or as a dedication, compensation for wharfage is limited to reasonable charges. Thus, the wharfinger occupies the same position precisely as does one who sets out a street in new building on his own land: *Heitz v. St. Louis*, 110 Mo. 625, 19 S. W. 735, and cases cited.

If the first part of the quotation heretofore made does not recognize that there are such things as private wharfs uncontrolled ⁴²⁷ and uncontrollable in their charges, then the words

used by Hale as aforesaid fail of their purpose and are devoid of meaning.

Allnutt v. Inglis, 12 East, 527, decides nothing to the contrary of the doctrine asserted by Hale, for that was a case where the London Dock Company built warehouses in which wines were deposited upon payment of such rent as the warehousemen and the depositors agreed upon. Afterward, however, the London Dock Company obtained from the government a certificate whereby, under the general warehousing act, the importers could lawfully lodge and secure their wines without paying the duties on them in the first instance; and this right was exclusive in the dock company and upon this it was held that in consequence of accepting the benefit arising from the certificate, such a monopoly and public interest attached upon the property of that company as compelled it to charge only reasonable rates for receiving wines into its warehouses, Lord Ellenborough remarking: "There is no doubt that the general principle is favored, both in law and justice, that every man fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."

In short, it is the privilege conferred either directly or indirectly, or the dedication to the public use, which give origin to the duty toward the public to demand only reasonable compensation for services rendered. And this is all, it would seem, that is meant by Hale when he speaks of "the wharf, crane," etc., being "affected with a public interest."

But for the acceptance of the exclusive privilege conferring certificate, there was no question, and there could be none, that the London Dock Company could have continued on the ⁴²⁸ even tenor of its way making such bargains for rent of its warehouses with its patrons as could be agreed upon, and no extent or magnitude of such business could have "affected with a public interest" the warehouses of the London Dock Company.

And it is not inappropriate to say just here that Allnutt v. Inglis, 12 East, 527, though quoted from on the basis and theory of being parallel to the Munn case, lacks such parallelism in this important and controlling feature and particular, to wit, that in the former the London Dock Company, of its own free will, accepted the warehousing act, and, having done so, took its burdens along with its benefits, while Munn & Scott were forced by the organic law, and in invitum had their private ele-

vator turned into a public one, without a single benefit received or a single privilege granted. Is it within the bounds or range of possibility for a distinction to be more plainly apparent than between these two cases? Had the all-omnipotent parliament of England forced the London Dock Company to accept the warehousing act, then this would have brought the Allnutt-Inglis case on the same plane and under the same rule as the Munn case announces, but had parliament done so, it would have been incontinently regarded as a high-handed invasion of common right.

In the License Cases, 5 How. 504, the only point decided was that various regulations for the sale of intoxicating liquors and requiring licenses to issue, enacted by certain states, were not repugnant to the federal constitution. As to the case of Mayor etc. v. Yuille, 3 Ala. 137, 36 Am. Dec. 441, cited and quoted in Munn's case to show that an ordinance regulating the weight and price of bread was valid, it suffices to say that the only point in judgment there was whether that portion of the ordinance was valid which regulated the weight of bread, and it was adjudged valid in that particular. The baker in that case had failed to conform to the ordinance in ⁴²⁰ regard to the weight of his loaves. On this ground alone was he prosecuted, to wit, that he had sold bread of less weight than that ordained by the ordinance. There was no question raised, and he raised none in the trial court about the price and so the remark made in 3 Alabama was wholly obiter. Even a casual reading of that case shows the correctness of this statement: See Buffalo v. Collins Baking Co., 57 N. W. Supp. 347; 39 App. Div. 432; 53 N. Y. Supp. 968; 24 Misc. Rep. 745. Bolt v. Stennett, 8 Term Rep. 606, illustrates the same principle announced in Allnutt v. Inglis, 12 East, 527, for there the crane was set up by its owners on a public quay (by an express or implied license of the government), and being so set up, the public had a right to resort there and make use of it in loading and unloading their vessels; and this being the case, compensation for such services could not be demanded beyond a reasonable sum.

In the principal opinion reference is made to the cases of public ferries, innkeepers, common carriers, hackney-coachmen, etc.; but in all these instances, those persons who engaged in such occupations or in building, owning or operating such properties, did so on the grounds and bases of some special privilege granted by the sovereign power, or of some open and unam-

biguous dedication to the public use, which grant or which dedication took with them the necessity of submission to the terms on which the grant or dedications were made.

Thus, an inn at common law was *publici juris*, and innkeepers compellable, where they had room, to receive all guests and their horses, and every man had a right to put up at such common inns, and they were devoted to the service of the community: *Robinson v. Walter*, 3 Bulst. 269; *Rex v. Collins, Palmer*, 367; 2 Roll. 345.

For this reason they were granted protection by the law; had a lien on the baggage and horses of their guests; were liable if their guests' goods were stolen, and were liable to suit ⁴³⁰ for refusing to receive a guest, he tendering a reasonable price for the same, and also liable to indictment for such refusal: 5 Bacon's Abridgment, tit. "Inns and Innkeepers," 232.

But although a livery-stable keeper does a very extensive business, yet he enjoys none of the privileges of an innkeeper, and contracts with his patrons on his own terms, and is not bound in law to receive coaches or horses, because he stands on the foot of private contract only, and is not under obligation by law to receive the horses, etc., of guests, as are innkeepers: *Francis v. Wyatt*, 3 Burr. 1498.

Thus, ferries were both private and public at common law; the former, where a person conveyed only himself and family across a stream of water; the other, where the owner could only operate it under a license, deemed a franchise, of the king, and where the ferry was treated as part and parcel of the public highway; and for so operating such ferry, the owner was permitted to take such rates of toll as the law allowed: *Mayor v. Starin*, 106 N. Y. 1, 12 N. E. 631, and cases cited.

Thus, with respect to mills, the lords of the manor, having erected mills on their respective domains for the public advantage, fettered their gift with the condition that those resident within their manors were to grind at their mills, and upon this exclusive right to compel the public to grind at their mills arose the right of the lord of the manor to regulate tolls taken at such public mills: *Woolrych on Waters*, c. 6; *Hix v. Gardiner*, 2 Bulst. 195; 15 Vin. Abr. 398, 399; *Cooley's Constitutional Limitations*, 8th ed., 735, 736.

In this country, mills being at an early day operated by water, they became affected by a public use, by reason of the fact that in order to establish them it became necessary to exercise the power of eminent domain in flooding the lands of

others, and thus the owner of the mill, having accepted governmental aid in establishing his mill, had to submit to governmental ⁴³¹ control as to his charges for grinding. And when steam mills came into use, it was an easy transition for the legislature to regulate their tolls without inquiring the reason or making any distinction between mills of the latter and of the former kind.

The same view holds as to the right to fix the fees of hackmen, exercising, as they do, a public employment in the public streets and engaged in an occupation affording special opportunities for impositions and frauds, and therefore requiring close supervision; they are granted privileges of occupying certain public stands denied to others, and their charges to the public are regulated, which is only a condition imposed in return for privileges granted, privileges otherwise liable to abuse.

And a like rule holds as to a common carrier, one who holds himself out to the public as ready and willing to carry for hire certain classes of goods. Doing this, he thereby exercises, so it is said, "a kind of public office," and grants the public such an interest in his business as authorizes each individual to demand the carriage of his goods upon tender of a reasonable, or a legally regulated, compensation. And as a result of his general assumpsit to the public, he is given a lien on the goods of his patrons, both for transportation and for advances made on them to the other carriers, and made responsible for their safe carriage except in certain cases.

Not so, however, with a mere private carrier, and no instance is on record where any legislation, even during the rigors of the common law, or the regime of an all-prevailing parliament has ever been attempted as to the regulation of his charges.

Nor can any instance be found where any lodging-house keeper, however extensive his business or numerous his patrons, has ever been deemed to have his "property affected with ⁴³² a public interest," or had his rates for board supervised or fixed by law. After discussing the cases of the common carrier, innkeeper, etc., the learned chief justice says: "Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly

“tends to a common charge, and is become a thing of public interest and use.” Every bushel of grain for its passage ‘pays a toll, which is a common charge,’ and, therefore, according to Lord Hale, every such warehouseman ‘ought to be under public regulation, viz., that he . . . take reasonable toll.’ Certainly, if any business can be clothed ‘with a public interest, and cease to be *juris privati* only,’ this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.”

The answer to the remarks thus made has already been given, and they may be further answered by saying that the cases of the common carrier, the innkeeper, etc., are exceptional to the general rule declaring that business relations of one man with another cannot be made compulsory.

“It is a part of every man’s civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice, or malice”: Cooley on Torts, 278.

Commenting on the same topic, it is said by another author: “Business relations must be voluntary in order to be consistent with civil liberty. An attempt of the state to compel one man to enter into business relations with another ⁴³³ can only be justified by some public reason or necessity. In an ordinary private business relation the state cannot constitutionally interfere, whatever reason may be assigned for one’s refusal to have dealings with another. It is no concern of the state or of the individual what those reasons are. It is his constitutional right to refuse to have business relations with a particular individual, with or without reason. But there are cases in which it has long been held to be within the scope of legislative authority to interfere with and compel the formation of these business relations. The common law of England and of this country has for centuries justified this power of control over common carriers and innkeepers. No man is compelled to become a common carrier or innkeeper; but if he holds himself out to the world as such, he is obliged to enter into business relations with all, under impartial and reasonable regulations. The common carrier must carry for all within his regular line of business, and the innkeeper must provide accommodation for all who come to him, as long as he has room for them. These two cases have for so long a time been recognized as exceptions to the general rule, in respect to the voluntary character of business relations, that the reasons for them are rarely, if ever, de-

manded, and certainly not questioned. But a determination of the constitutional reasons for these exceptions, if there are any, will help to discover the limitations of legislative power in respect to other kinds of business": Tiedeman on Limitation of Police Power, sec. 92.

So that it is only on the basis of the exercise of the police power, and that exercise based on certain exceptional conditions, that a person engaged in some quasi public business and enjoying some privilege or immunity incident to such business, or where he has dedicated his property to a public use, ⁴³⁴ that he can be brought under governmental control in relation to such property or business and its regulation.

As aptly remarked by Mr. Justice Field in his dissenting opinion: "One may go, in like manner, through the whole round of regulations authorized by legislation, state or municipal, under what is known as the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the state, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession will be enjoyed. When the privilege ends, the power of regulation ceases. Jurists and writers on public law find authority for the exercise of this police power of the state, and the numerous regulations which it prescribes in the doctrine already stated, that everyone must use and enjoy his property consistently with the rights of others, and the equal use and enjoyment by them of their property. 'The police power of the state,' says the supreme court of Vermont, 'extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property in the state. According to the maxim, "Sic utere tuo ut alienum non laedas," which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others': Thorpe v. Rutland etc. R. R. Co., 27 Vt. 149, 62 Am. Dec. 625. 'We think it a ⁴³⁵ settled principle growing out of

the nature of well-ordered civil society,' says the supreme court of Massachusetts, 'that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community': *Commonwealth v. Alger*, 7 Cush. 84.

As pointed out in the opinion just quoted from, Chancellor Kent, when treating of the protecting care which the constitution throws over private property, says: "But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others or of the public. The government may, by general directions, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community": 2 Kent's Commentaries, 340.

Having made the quotations just above, Mr. Justice Field proceeds to say: "The citations show what I have already stated to be the case, that the regulations which the state, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use, or for the services of ⁴³⁶ the owner in connection with it. There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the state to control, at its discretion, the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition

upon which the owner shall receive the fruits of his property and the just reward of his labor, industry and enterprise. "That government," says Story, 'can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint.' The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred': *Wilkinson v. Leland*, 2 Pet. 657. The decision of the court in this case gives unrestrained license to legislative will."

Judge Cooley, in commenting on the "Police Power of the States," says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are inculcated to prevent a conflict of rights and to insure to each other uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others": *Cooley's Constitutional Limitations*, 6th ed., 704.

"The limit to the exercise of the police power in these ⁴³⁷ cases must be this: The regulations must have reference to the comfort, safety, or welfare of society. . . . The maxim, 'Sic utere tuo ut alienum non laedas,' is that which lies at the foundation of the power": *Cooley's Constitutional Limitations*, 6th ed., 710.

Further on the eminent author quotes from and discusses the *Munn* case, and in doing so says: "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment, with special privileges which only the state can confer upon him, the case is clear enough": *Cooley's Constitutional Limitations*, 6th ed., 736. He then proceeds to state: "In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is per-

mitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard-tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, etc.; 2. Where the state, on public grounds, renders to the business special assistance, by taxation or otherwise; 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement; 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases": Cooley's Constitutional Limitations, 6th ed., 738. •

⁴³⁸ But it is quite observable that *Munn's* case does not fall within any of the categories which are mentioned in the list just quoted, although that case was necessarily under criticism in the very definition of instances where legislation would be constitutional.

Elsewhere, Judge Cooley touches on the same subject by saying: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them": Cooley's Constitutional Limitations, 6th ed., 744, 745.

And in treating in this connection of the regulation of business charges and the power of the state in this regard, he makes these observations: "In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty": Cooley's Constitutional Limitations, 6th ed., 734.

Similar observations respecting the regulation of prices of labor, manufactures, and commodities by the different states before the American Revolution, and of the abandonment of

such regulations after our independence was achieved, and federal and state constitutions were framed and adopted, are ⁴³⁹ to be found in an interesting and instructive address delivered before the State Bar Association two years ago by Honorable G. A. Finkelnburg, in which, after speaking of such regulations and their discontinuance when more rational ideas of the personal rights of individual citizens began to prevail, he says: "In other words, it was assumed to be a part of the natural and civil liberty guaranteed by American institutions to form business relations and to make contracts free from state interference, and this was thought to include the right of everyone to ask for his wares or services whatever price he was able to get and others were willing to pay": 32 American Law Review, 503.

Of course, isolated cases, sporadic instances, perhaps, may be found of statutes making regulations of the sort, but they are extremely scarce; and it is to the last degree doubtful whether such an enactment is yet to be found lingering obsoletely on the statute books of any of our states; certainly, it is not enforced.

The supreme court of Illinois in *Munn's* case, when speaking of the power to "make needful rules and regulations respecting the use and enjoyment of property," speaks of familiar instances in which the exercise of it in the state has been unquestioned, and among them, "in delegating power to municipal bodies to regulate charges of hackmen and draymen and the weight and price of bread." Whereupon Judge Cooley says: "Regulating the weight of bread is common, and necessary to prevent imposition; but regulating the price of bread we should suppose would now meet with such resistance anywhere as would require a distinct determination upon its constitutional rightfulness. How the baker can have the price of that which he sells prescribed for him, and not the merchant or the day laborer, is not apparent. Indeed, to admit the power seems to render necessary the recognition of the principle that there is and can be no limit to legislative interference, ⁴⁴⁰ but such as legislative discretion from time to time may prescribe": Cooley's Constitutional Limitations, 6th ed., 736.

And if the extensive nature and magnitude of the business is to authorize legislative interference with the rates of prices charged, and thus "affect with a public interest" the property employed in such business, as is the evident theory

which bore with great weight on the mind of the court of ultimate resort, then in addition to numerous instances suggested by Judge Cooley and by Justices Field and Brewer where legislative interferences would logically follow the rule adverted to, may be mentioned the case of the farmers of this country whose labors on many million fields supply not only their own native land, but a large portion of the civilized world with corn, wheat, pork, and beef. Surely the products of these farms on which they labor, if not the farms themselves, are "affected with a public interest," for, in the language of the federal supreme court: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control": *Munn v. Illinois*, 94 U. S. 126.

If the property of these farmers is not "used in a manner to make it of public consequence and affect the community (indeed, the world) at large," if they do not "devote their property to a use in which the public has an interest" (a very great interest), and thereby "in effect grant to the public an interest in that use," it is difficult to conceive of a case where "property does [not] become clothed with a public interest,"⁴⁴¹ and if thus "clothed," then according to the rule laid down the right of the legislature of each state to regulate and to settle the prices of each bushel of wheat and of corn, and of each pound of beef and pork, cannot for a moment be gainsaid or denied. Their business is certainly of "public consequence," as but for the labors of the farmers, the elevators of this country, and the mills, and indeed all manufactories would stand still, and all commerce with foreign nations cease, to say nothing of other and greater calamities incident to a cessation of farming operations, and in consequence a cessation of a food supply.

Contrasted with such a business, which is truly a "virtual monopoly," all other human occupations fall into insignificance. Assuredly, then, the business of farming is necessarily a "devotion of property to a use in which the public has an interest," and its pursuit "in effect grants to the public an

interest in that use," and this being the case, submission to public control as to rates a fortiori follows. But he would indeed be regarded as a bold innovator, if not a madman, who, keeping within the lines marked out in Munn's case, and following the premises there laid down, to their logical conclusion, should offer a bill establishing the maximum rates at which wheat, pork, etc., could be sold, or merchandise or wares of the shoemaker or the potter or the blacksmith; certainly all of these products of labor do "become clothed with a public interest," because "used in a manner to make them of public consequence, and affect the community at large."—It is not easy to see how they could be used in any other manner.

In the state supreme court in defense of the decision as to regulation of prices, the case of regulating interest on money is instanced. But at common law, taking any interest on money was called usury, was a crime, punishable by ecclesiastical censures during life, being regarded by canon law ⁴⁴² a mortal sin, and if after death one were found a usurer while living, all his chattels were forfeited to the king and his lands escheated to the lord of the fee: 1 Hawkins' Pleas of the Crown, cap. 82.

Afterward, parliament made it lawful to take a limited rate of interest, but it is said that this was not on the theory of legislation arbitrarily fixing the price for the use of property, but of granting a privilege which the common law denied. Judge Cooley is of opinion that usury laws are not sustainable on principle: Cooley's Constitutional Law, 3d ed., 260.

It was asserted in the state supreme court that so long as one retains title and possession of his property, he is not deprived of his property within the meaning of the fourteenth amendment. The "destruction must be, for all substantial purposes, total." This doctrine was echoed by the higher court. The latter court seems to regard it as a matter of regret that the word "deprive" used in the above amendment was not therein "defined." Apart from the fact that the same word had long before been employed in the constitutions of the several states, in fact or in substance (2 Story on Constitution, sec. 1940), and the word itself, in article 5 of the original constitution, and in article 5 of the amendment thereto, and apart from the fact that it is not customary in framing an organic law to define the words used in composing it, the standards of our language, as well as judicial decisions, may be consulted. Turning

to those standards we find that the word "deprive" "conveys the idea of either taking away that which one has or withholding that which one may have": Crabb's Synonyms. Other standards of our language define the word "deprive," "to take something from; to keep from acquiring, using, or enjoying something": Standard Dictionary. Deprive: "To take away; end, injure, or destroy": Century Dictionary. And the synonyms of "injure" are: "To do harm to; inflict damage ⁴⁴³ or detriment upon; impair or deteriorate in any way": Century Dictionary.

Turning to judicial decisions, we find that in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, it was held that the flooding of a man's land by constructing a dam across a river, under authority of a state law, was a taking within the prohibition, and required compensation to be made to the owner of the land thus flooded in order to meet the demands of the constitution, and that it was not necessary that property should be absolutely taken in the narrowest sense of that word to bring the case within the constitutional provision; that consequential injury was in many cases a sufficient basis on which to invoke the protection of the fundamental law, and that serious interruption of the common and necessary use of property is such as will be equivalent, under the constitution, to a taking.

This court reached a similar conclusion under the constitution of 1865, "that no private property ought to be taken or applied to public use without just compensation," where the city built a dike out into the river several hundred feet, thus filling up with mud the channel at that point, thereby cutting off the plaintiff, a riparian owner, from his customary access to the stream where his landing was: *Myers v. St. Louis*, 82 Mo. 367.

It is familiar law that the fee of land will pass by deed which grants the rents, issues, and profits of the land mentioned (3 Washburn on Real Property, 5th ed., 406), and the same method of description holds good in a devise: Schouler on Wills, 3d ed., sec. 503. And so of a devise of the income of land: *Ryan v. Allen*, 120 Ill. 648; *Parker v. Plummer*, Cro. Eliz. 190. This was so in the days of Lord Coke, who, when treating of this rule of description, said: "For what is land but the profits thereof?" Coke on Littleton, 4b.

So that it results that "to deprive one of the use of his ⁴⁴⁴ land is depriving him of his land": Sutherland, J., in *People v. Kerr*, 37 Barb. 399. Such deprivation may be partial

or total, but in either case compensation, under constitutional guaranties, is an inseparable incident. (Of course, cases of mere incidental injury are not included in these remarks.)

These observations, drawn and deduced from the authorities cited, find ample and felicitous illustration in the case of *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147. In that case the railroad corporation, claiming to act under legislative authority, removed a natural barrier situated south of E.'s land, which theretofore had completely protected E.'s meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed onto E.'s land, carrying sand, gravel, and stones thereon. Held, that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation.

In discussing the points presented by the record, Judge Jeremiah Smith delivered an opinion which for close analysis and exhaustive research is seldom equaled. Among other things, he said: "The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. . . . The constitutional prohibition (which exists in most, or all, of the states) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if read: 'No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable.' To constitute a 'taking of property,' it seems to have sometimes⁴⁴⁵ been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded on a misconception of the meaning of the term 'property,' as used in the various state constitutions.

"In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it. . . . It denotes a right . . . over a determinate thing. . . . Property is the right of any person to possess, use, enjoy, and dispose of a thing': Seldon, J., in *Wyne-*

hamer v. People, 13 N. Y. 378, 433; 1 Blackstone's Commentaries, 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land: See 2 Austin on Jurisprudence, 3d ed., 836; Ellis, J., in Walker v. Old Colony etc. Ry., 103 Mass. 10, 14, 4 Am. Rep. 509. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, ipso facto, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,' although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same ⁴⁴⁶ property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestrained right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a 'taking of property.' Why not the former?

"If, on the other hand, the land itself be regarded as 'property,' the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting, not merely empty titles, or barren insignia of ownership, which are of no substantial value. If the land 'in its corporeal substance and entity' is 'property' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is fundamentally the right of user, including,

of course, the corresponding right of excluding others from the use: See Comstock, J., in *Wynehamer v. People*, 13 N. Y. 378, 396. . . .

"The principle must be the same whether the owner is wholly deprived of the use of his land or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation takes a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial⁴⁴⁷ but substantial restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part 'is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same': See 6 American Law Review, 197, 198; Lawrence, J., in *Nevins v. Peoria*, 41 Ill. 502, 511, 512, 89 Am. Dec. 392."

A ruling in which, in similar circumstances, a like result was reached has occurred in England: *Lawrence v. Railroad*, 20 L. J., N. S., 293; 2 Eng. L. & Eq. 265, cited in Angell on Watercourses, 7th ed., sec. 331a.

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision": *People v. Otis*, 90 N. Y. 48.

As the right to the use of property is all that makes it valuable, and there may be a partial deprivation of such use equally demanding compensation as would a total deprivation, then it must also follow that a legislative and compulsory diminution of "the price of the use of property" (to phrase it as does the learned chief justice) must be equally as obnoxious to constitutional prohibitions as a similar diminution or deprivation of the use itself. It would seem nothing could be more logically clear than this.

Both in the state supreme court and in that of the nation it was ruled that the fixing of a reasonable compensation for the use of property was wholly a legislative and not a judicial question—that is, a maximum in rates beyond which the owner could not go; and that the only redress against these arbitrary legislative edicts was: "For protection against abuses by legislatures the people must resort to the polls, not to the courts." According to this, if the owner of a watermill should have the stream which turns it diverted by legislative

⁴⁴⁸ authority so as to injure or ruin his business, so long as he is left in peaceful possession and his title is untouched he has not, according to the state supreme court, had his constitutional rights invaded, and according to the federal supreme court, if the stream has been only partially diverted, and he has water enough left him to grind one bushel a day where he ground forty before, he is not entitled to compensation for his loss nor to due process of law to ascertain it; the question has simply resolved itself into one of legislative expediency.

This position as to regulating rates by law was not, however, long maintained; it was abandoned in subsequent cases, holding that "the element of reasonableness . . . is eminently a question for judicial investigation, requiring due process of law for its determination": *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702. To the like effect are *Reagan v. Farmers' etc. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047; *St. Louis etc. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484, and other cases.

But the court has never yet ventured to fix what rates would be reasonable; though "judicial protection" is certainly more preferable than "resort to the polls."

This change in position would appear quite a modification of the original doctrine. The case of *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, 22 N. E. 670, 682, was a case of a "floating elevator," but the same doctrine was announced as in *Munn's case*, where the elevators were stationary. Mr. Justice Peckham (with whom concurred another member of the court) delivered a most exhaustive and instructive dissenting opinion, in which are reviewed a great array of authorities all bearing on the subject under discussion and all opposed to *Munn's case*. When the cause reached the final tribunal (*Budd v. New York*, 143 U. S. 549, 12 Sup. Ct. Rep. 468) Mr. Justice Brewer, in dissenting said with great force and aptness (*rem acu tetigit*): ⁴⁴⁹ "The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property." And in the course of his dissent in discussing the doctrine above referred to, he took occasion to very pertinently say: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a

public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream."

In concluding his opinion, in which Mr. Justice Field and Mr. Justice Brown concurred, the learned justice expressed the hope: "I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property or the performance of his personal services will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is, in fact, devoted to a public use."

In his dissenting opinion in *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, 22 N. E. 682, Mr. Justice Peckham noticed the fact that in *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4, Mr. Justice Miller, speaking for the court in regard to *Munn's case*, and what was there decided, said: "And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the ⁴⁵⁰ exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

But this states a very different doctrine and very different facts to those announced in the case to which it refers, because *Munn* was not "engaged in a public business," nor did the "public have a right to require his service."

In *Brass v. Stoeser*, 153 U. S. 391, 14 Sup. Ct. Rep. 857, the defendant owned a small elevator located on his own land; capacity thirty thousand bushels; his exclusive business was buying and selling grain, although occasionally he accommodated his neighbors with the temporary use of his bins, when those bins were temporarily empty; but yet it was held that under the rule in *Munn's case*, he was bound to accommodate all comers, notwithstanding the "admitted fact that if compelled, as he was compelled by the mandate, to receive grain as tendered so long as he had storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator,

would be utterly ruined and destroyed." To this ruling Brewer, Field, Jackson, and White, JJ., dissented.

Recurring to the views of Lord Hale as heretofore quoted, it is not thought, as already stated, that those views give countenance to what is asserted of them in the principal case, nor does Judge Cooley approve of the construction placed upon them by the court, as above pointed out. But granting that Hale's views are as extreme as represented, or that certain deductions are warranted therefrom, yet it must not be forgotten that he wrote at a time when paternalism was in flower, and its veritable exponent, chapter 4 of fifth Elizabeth, was in full force.

"That statute assumed to regulate the existence and determine the number of the artisans in the whole country. It provided how long one should work as an apprentice; how many there should be in proportion to journeymen; where they should ⁴⁵¹ live; under what circumstances move to another neighborhood; how many hours they should labor, and for how long a time a journeyman should be employed; and, finally, it provided that wages should be assessed for the year by the justices of the peace, who were also directed to settle all disputes between masters and apprentices. By an act of the first of James I, chapter 6, the above act was extended by giving to the justices power to fix the wages, not only of journeymen and apprentices, but of all kinds of laborers and workmen.

"During this time, also, there were statutes making it a felony to export wool from England, and the exporter of sheep, rams, or lambs was liable to imprisonment, the forfeiture of all his property, and to have his left hand cut off for the first offense, and for the second offense to be adjudged a felon and to suffer death accordingly: See 8 Elizabeth, c. 3; 13 & 14 Charles II, c. 18. Provisions were extant forbidding exportation of hides, raw or tanned leather, and many other things, and all for the supposed benefit of the kingdom or the various interests in whose favor the legislation was enacted: McCulloch's Smith's Wealth of Nations, 292 et seq. Laws were then in force which regulated down to the minutest detail the manner of life, and the texture of dress and the costliness thereof, and the variety of dishes upon the tables of the people; special laws determined how much land of an estate should be plowed and how much left in pasture; how much was to surround a laborer's cottage; how many sheep should be supported on a farm: 6 Lecky's England in the Eighteenth Century, 231 et seq.";

People v. Budd, 117 N. Y. 45, 15 Am. St. Rep. 460, 22 N. E. 670, 682.

That Hale's views were colored by the state of the then existent statutory law no one can doubt who has any knowledge of the nature of the human mind. Besides, when Hale wrote, the country where he wrote was under the dominion of a practically omnipotent parliament, unfettered and unhampered by ⁴⁵² the prohibitions of a written constitution. In the opinion under comment it is said: "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British parliament, . . . so that now the governments of the states possess all the powers of the parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitution": *Munn v. Illinois*, 94 U. S. 124.

Now, if by this statement it is meant to be intimated, as seems to be the case, from subsequent observations, that a state legislature is possessed of substantially the same powers as the parliament of Great Britain, the intimation is unfounded in, and unsupported by, recognized authority. Discussing the essential difference between the powers of the British parliament and those of a state legislature, Judge Cooley says: "It is natural, also, . . . to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the government if it wills so to do; while, on the other hand, the legislatures of the American states are not the sovereign authority, and though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative": *Cooley's Constitutional Limitations*, 102.

Touching this matter it is said by the author of the *Institutes*: ⁴⁵³ "The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute that it cannot

be confined either for persons or causes, within any bounds. . . . It can, in short, do everything that is not naturally impossible. . . . True it is, that what the parliament doth, no authority upon earth can undo": 4 Inst. 36; 1 Blackstone's Commentaries, 161. "The strong language in which the complete jurisdiction of parliament is here described is certainly inapplicable to any authority in the American states, unless it be to the people of the states when met in their primary capacity for the formation of their fundamental law," etc.: Cooley's Constitutional Limitations, 103.

Parliament "is at once a legislature and a constitutional convention": 1 De Tocqueville's Democracy in America, c. 6, p. 103; Eaton v. Boston etc. R. R. Co., 51 N. H. 516, 12 Am. Rep. 147.

Munn's case has met with many criticisms of an adverse character in addition to those above noted. Speaking of the doctrine it establishes, Tiedeman, in reviewing that case, remarks: "I say this rule has been laid down for the first time, although the chief justice refers to it as a long-established rule, and refers to Lord Hale as his authority. A careful study of Hale's writings will disclose the fact that to no case does he refer in which the business does not under the law constitute a privilege, more or less of a legal monopoly. There is nothing in his writings to justify the application of his rule or his reasoning to a business which is a virtual monopoly, but is not made so by law": Tiedeman on Limitation of Police Power, 230, 231.

Volume 16 of the American Law Register, New Series, 526, published the opinion as well as a very copious note, citing many authorities, which concludes thus: "No other court has ever held that a legislature could fix the rate at which a private person performing a service, in which he has no other monopoly than that ⁴⁵⁴ which the possession of superior means for conducting his business gives to him, and no aid from the public, should be compensated for the service. No such case is cited in the opinion. Therefore, none need be cited contra." And criticism has not been confined to this side of the Atlantic; even in the land from whence our common law is derived, Mr. Bryce, a lawyer and statesman of distinguished ability and author of the great work "The American Commonwealth," in reviewing the case, thinks that the decision was perhaps more the effect of public opinion in its action upon the court than of a strict adherence to legal principles; and while, as he says, not presuming

to question its correctness, yet adds that it evidently represents a different view of the sacredness of private rights, and of the powers of the legislature, from that entertained by Chief Justice Marshall and his associates: See 1 Bryce's American Commonwealth, 267.

Much was said in the opinion in question, about a "virtual monopoly." These words were, it is true, used by Lord Ellenborough in 12 East, but those words must be construed with reference to the facts then presented. It was a clear case of a legal monopoly; for there the London Dock Company was mentioned by name in the warehousing act, and was the only company into whose warehouses wines could be stored without prior payment of excise duties.

There can be no such thing as a legal monopoly unless based upon a license or privilege allowed by the king, etc.: 4 Blackstone's Commentaries, 159. To same point are *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 606, 607, per Story, J.; *Richmond v. Dubuque etc. R. R. Co.*, 26 Iowa, 191, 201, 202; affirmed, *Railroad Co. v. Richmond*, 19 Wall. 584; In re *Greene*, 52 Fed. 104; and necessarily the party to whom the license is granted takes it on such conditions as the license granting power may see fit to impose.

⁴⁵⁵ 4. It has been thought best to consider at large the doctrine announced in the case relied on, as well as opposing views, in order to endeavor to discover whether *Munn's* case, granting it correctly decided, has any application to the case at bar. Following a familiar rule, the general words employed in that opinion should be restricted to the particular facts of that case and should not be extended to other cases which could not have been in the mind of the court at the time: *Cohens v. Virginia*, 6 Wheat. 264, 399, per Marshall, C. J.; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154; nor has that court so extended them to any case of similar sort to the one before us.

The controlling element which gave origin to the opinion relied on seems to have been that of a monopoly. But, of course, that element can have no place in the present instance, because respondent has been granted no special or exclusive right or privilege by the state, nor has it received any benefits from that quarter. Nor has the respondent acquired any additional right by reason of its incorporation, to that it possessed before. Everyone is at liberty to gather news; and the fact that one has greater facilities or finances for gathering and transmitting

news, or that the business has grown into one of great magnitude, widespread in its ramifications, or that mere incorporation has been granted a company organized for the purpose of gathering news, does not, and cannot, of itself give the state the right to regulate what before incorporation was but a natural right: Tiedeman on Limitation of Police Power, sec. 93, p. 234.

Were the rule otherwise than as just stated, the effect would be to deprive a person of a right to pursue any lawful calling or to contract where and with whomsoever and at what price he will. The right thus to contract cannot be interfered with; it is part and parcel of personal liberty, and therefore under the protection of section 30, article 2, of our state constitution and of the fourteenth amendment of the constitution ⁴⁵⁶ of the United States, as heretofore quoted: Cooley's Constitutional Limitations, 944, 945; Cooley on Torts, 278; State v. Loomis, 115 Mo. 307, 22 S. W. 350, and cases cited; State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, and cases cited. To like effect, see Allgeyer v. Louisiana, 165 U. S. 589, 591, 17 Sup. Ct. Rep. 427; Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128-130.

If relator's position as to its right to compel respondent to turn over to it the results of its labors and researches after news is correct, then by the same token any citizen could compel any newspaper to admit him as a subscriber; or as news is a synonym of information, intelligence, knowledge, then a lawyer profoundly versed in his profession could be compelled to yield his treasures of erudition to some less fortunate member of the bar, of the type described by Swift:

"Who knows of law nor text nor margin,
Calls Singleton his brother sergeant."

And even if the business of respondent can justly be deemed a monopoly, then relator's efforts should be directed toward the destruction of that monopoly, and not toward obtaining the mandate of this court compelling relator's admission into that "real genuine article," as counsel are pleased to designate it.

Conceding respondent's business to be in truth a monopoly would furnish an all-sufficient reason and answer for denying the relief relator asks; because the addition of one more monopolist to a monopolistic organization would not lessen its monopolistic features, or abate its vicious tendencies. But there is nothing here on which a monopoly can attach. The business is

one of mere personal service; an occupation. Unless there is "property" to be "affected with a public interest," there is no basis laid for the fact or the charge of a monopoly: See, on this point, *Morris v. Colman*, 18 Ves. 437, per Lord Eldon; ⁴⁵⁷ *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. D. 598, 609, per Lord Esher; *Express Cases*, 117 U. S. 1, 21, 24, 6 Sup. Ct. Rep. 542, 628; *Chicago etc. Ry. Co. v. Pullman etc. Car. Co.*, 139 U. S. 79, 89-91, 11 Sup. Ct. Rep. 490.

Nor is there any more property in "news" to wit, "information," "intelligence," "knowledge," than there is in "the viewless winds," until the "guinea stamp" of a copyright is impressed upon its external similitude, thus giving it one of the elements of property, to wit, governmental protection for a limited period. That there is no monopoly even in fact in the business in which respondent is engaged, is shown in the clearest possible manner by this record. Other news-gathering agencies have the same facilities over the wires of the Western Union Telegraph as has the Associated Press; the terms of the telegraph company are uniform as to all organizations, and such other agencies are at work in their occupation, and it would seem with great success. Hundreds of daily newspapers in every quarter of the Union, leaders in point of circulation in their respective localities, look for their news supplies to some other agency than that of respondent. Some publishers accustomed to receive reports from respondent have discontinued their business relations with it and gone to some rival or competing organization. The "New York Sun," repeatedly urged to join the respondent, has continuously declined. And the relator company, notwithstanding the allegations of its petition that its paper could not be published with a profit without the aid of the Associated Press, Mr. Lowenstein, the "Star's" business manager, gives it as his opinion under oath that "the 'Star' prints a better budget of news than any of its rivals."

For the purpose of obtaining its supplies of news, the "Star" is affiliated with the "New York Sun" or Laffan News Bureau, and concerning the efficiency of that service, Mr. Laffan, testifying, says: "It has no equal at all, from our point of view." And answering the question whether, "as a ⁴⁵⁸ matter of fact, is it better than the Associated Press," answered: "Of course it is; everybody knows that." And Mr. M. E. Stone, general manager of the Associated Press, says that the Scripps-McRae service is an excellent one.

If these statements are to be taken as true, and so they will be regarded for the purposes of this case, relator has no standing in court, because Lord Ellenborough, in the *Allnutt-Ingليس* case, *supra*, after commenting on the fact that the London Dock Company's warehouses were the only places where wines of importers could be bonded, went on to say: "If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly": 12 East, 540. And because, further, a court in circumstances as above related will not award a discretionary writ as now here prayed, for the mere purpose of determining an empty and barren technical right in behalf of a petitioner; it will "let well enough alone."

Subsidiary to considerations heretofore mentioned may be suggested others tending in the same direction. In *Mathews v. Associated Press*, 61 Hun, 199, 15 N. Y. Supp. 887, defendant, a corporation organized under the act "to incorporate the Associated Press of the state of New York" (Laws 1867, c. 754), adopted a by-law prohibiting its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose." A suspension of all the rights and privileges of the association was provided as a penalty for a violation of said provision. In an action to restrain defendant from enforcing this penalty, held, that the association had power to enact the ⁴⁵⁹ by-law; that it was not objectionable either as unreasonable and oppressive, or as tending to restrain trade and competition and to create a monopoly.

It appeared that while defendant only appoints and engages agents, in the strict sense of the term, in the state of New York by virtue of contracts with other associations, it receives from them news collected from the principal portions of the civilized world. Plaintiffs are also members of, and they publish the news received from, another press association which collects its news, by its own agents, from substantially the same territory. Held, further, that this action of plaintiffs came within the prohibition of the by-law and authorized defendant to enforce the penalty.

The court in general term, among other things, said: "The business of collecting the news of the day and furnishing re-

ports of it to the press for a compensation, has become a very well known and important industry. It can scarcely be called a branch of trade. There is no right of property in the news itself. That is neither bought nor sold. Any man who hears it may make such use of it as he can for his own advantage or may communicate it to others. So he may make a business of collecting news and furnishing reports of it to the newspapers, or to such of them as will compensate him for his trouble. The work is commonly done in the locality of each newspaper by its own reporters employed and paid for that purpose. . . . In this case the agents are employed by the defendant, the Associated Press of the state of New York, acting for all the publishers who are comprised in its membership. As to all these, the charter and by-laws of the corporation constitute the contract between themselves and between them and the association. Among the provisions of that contract is one to the effect that none of the members shall contract with any other news association to employ for them agents for ⁴⁰⁰ the procurement of news within the same territory as that in which agents of the defendant association are employed. This contract between the members of the association is mutual and is for the common benefit, and so is supported by a sufficient consideration. It is for the common benefit, because the efficiency of the association depends upon the number and activity of its agents, and these largely upon the extent of its revenues; from which salaries are paid, and that, in turn, upon the number of its patrons. So the building up of competitors which must draw off from its patronage will necessarily detract from the extent and value of its work. The contract, therefore, of the associates with each other and of those with the association which is embodied in the by-law in question seems to us not to exceed the proper bounds of self-protection and not to be unreasonable nor obnoxious to any principle which has been invoked for its condemnation."

This ruling of the supreme court was unanimously affirmed by the court of appeals, Mr. Justice Peckham delivering the opinion, who afterward delivered the opinion of the court in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 540.

In a prior case (*Dunlap's Cable News Co. v. Stone*, 15 N. Y. Supp. 2, 60 Hun, 583) the contention was made that news-gathering was a "public business."

The Cable News Company was a corporation engaged in collecting news and selling the same to all newspapers applying therefor. The New York Associated Press was an association of newspaper proprietors also engaged in the business of collecting news and furnishing it to newspapers. The association had a by-law to the effect that none of its members should take news from any other agencies. For violation of this by-law by a number of publishers the association threatened to discontinue its service to them. The suit was to enjoin the association from such proposed action. The plaintiff alleged that ~~the~~ the business engaged in by the parties was "a public business, and that both plaintiff and the said New York Associated Press are therefore under an obligation to serve the entire public; and that it is essential for the proper conduct of a newspaper and for the interests of its readers, subscribers, and advertisers, and for the interest of the public, that such newspaper should be at liberty to avail itself of all sources of information, and combine, if it think best, the intelligence and information furnished by the various agencies instituted for that purpose."

A motion for an injunction pendente lite was denied. On appeal to the general term the ruling below was sustained. The court said: "The plaintiff's application amounted to nothing more nor less than an attempt to restrain the defendants from transacting their lawful business in their own way, lest in doing so plaintiff's rival business should be injured or diminished. The defendants have a perfect right to limit the sale of the news which they collect to those who contract to deal exclusively with them. They are private individuals, dealing, it is true, with a large public, but governed by no corporate duty or statutory obligations. They certainly owe no duty to the plaintiff, which is a foreign corporation, attempting to compete with them, and with whom they have no privity or relations of any kind." In the latter case the defendant association was not incorporated; in the former it was, but both cases were treated alike in this respect.

And it has been determined that: "A voluntary association, whether incorporated or not, has, within certain well-defined limits, power to make and enforce by-laws for the government of its members. Such by-laws are ordinarily matters between the association and its members alone, and with which strangers have no concern": *American Livestock Com. Co. v. Chicago*

Livestock Exchange, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274.

⁴⁶² The charter of respondent, after emendation, is couched in these words: "The object for which it is formed is to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same." Under the terms of its charter respondent owes no duty to relator, since it possesses no greater right in regard to the gathering and purchase, etc., of news than its incorporators possessed as individuals, before the act of incorporation: *Authorities supra*. But on the basis that the charter, by-laws, etc., place respondent on the plane of any other corporation in charge of a "public utility," relator asserts that respondent's business is to be regarded in the same light precisely as a railroad, telegraph, or telephone company; that it involves a public franchise. But in *American Livestock Com. Co. v. Chicago Livestock Exchange*, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274, it was ruled that the mere fact that the business of a particular market owned by a private corporation has become so large as to influence the commerce of a large section of the country will not give the courts any power to declare such market public, and impressed with a public use, or to apply to it any rules of public policy peculiar to that class of markets. That power belongs alone to the legislative department of the state: See *Express Cases*, 117 U. S. 1, 21, 24, 6 Sup. Ct. Rep. 542, 628; *Little Rock etc. R. Co. v. St. Louis etc. Ry. Co.*, 41 Fed. 559, 569, per Caldwell, J.; *Interstate Commerce Commission v. Cincinnati etc. Ry. Co.*, 167 U. S. 479, 499, 17 Sup. Ct. Rep. 896; *Delaware etc. Ry. Co. v. Central Stock Yards Co.*, 45 N. J. Eq. 50, 17 Atl. 146.

In making this ruling not only was *Munn's case* on the point involved cited with approval, but in addition thereto *Ladd v. Southern Cotton Press Co.*, 53 Tex. 172, was cited, and its language approvingly quoted: "We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected ⁴⁶³ by it are so numerous that the interests of society demand that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature (if not restrained from doing so by the constitution), before a demand for such use could be enforced by the courts."

It is not pretended here that such legislation as would make respondent corporation's business *juris publici* has been enacted, granting that such legislation could have any extra-territorial effect, as to which see *Vawter v. Missouri Pac. Ry. Co.*, 84 Mo. 679, 54 Am. Rep. 105; *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39, and cases cited; *Harris v. White*, 81 N. Y. 544.

It is needless to discuss in this connection cases which bring into view the duties of railroad, telegraph, and telephone companies, since those companies, having accepted legislative favors, right of eminent domain, etc., must shoulder the burdens along with the benefits, and their business becomes, by such acceptance, *ipso facto publici juris*. Not so, however, with respondent, which was granted no privileges, asks none, and cannot, therefore, be burdened with conditions such as pertain to common carriers and the like.

As to the case of *Minnesota Tribune Co. v. Associated Press*, 83 Fed. 350, it seems to recognize the validity of such contracts by the Associated Press as are the subject of complaint here. But if this is not so, we prefer the ruling and reasoning on this point in *Mathew's case*.

In regard to *New York etc. Stock Exchange v. Board of Trade*, 127 Ill. 153, 11 Am. St. Rep. 107, 19 N. E. 855, much relied on by relator: For many years the board of trade had been accustomed to furnish to all customers the telegraphic reports as to daily and hourly conditions of the grain and other markets; having done so for such a long time, it undertook suddenly to disrupt those long-continued business relations and leave the plaintiff, a corporation ⁴⁶⁴ engaged in the commission business, without any means of conducting its ordinary and long-established business; and upon this basis it was very properly held that plaintiff was entitled to injunction to prevent the threatened disruption of business. This was the very gist of the decision in that case, and we need not say whether we fully indorse much of the language and of the reasoning used in arriving at the conclusion reached; and this reason, among others, occurs why we need not, and that is, respondent has never entered into business relations with relator, and consequently there are no such relations to be severed, and no such injurious results can occur in this case as in the one referred to.

Relative to the recent decision by the supreme court of Illinois in *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438,

75 Am. St. Rep. 184, 56 N. E. 822, to which our attention has been called, the Inter-Ocean company was engaged in publishing two newspapers in Chicago, the "Daily" and the "Weekly Inter-Ocean." A contract was entered into between the parties as to furnishing news in accordance with the by-laws of the Associated Press. This contract the Inter-Ocean Publishing Company violated by procuring and publishing news obtained from other news concerns located in the city of New York. Being notified by the Associated Press to appear to answer such charges of violation of contract, the Inter-Ocean Publishing Company resorted to injunction to prevent expulsion for violation of the by-laws of the Associated Press, which formed part and parcel of the contract between the parties. The Inter-Ocean Publishing Company admitted in its bill for injunction that it had violated its contract, and, seemingly by way of excuse, alleged that it could not obtain all the news from the other contracting party, and so was forced to engage the services of other news-gathering associations. Answer was filed, and upon hearing had the bill was dismissed for want of equity, ⁴⁶⁵ and this decree was affirmed in the appellate court. But when the cause reached the supreme court the decrees of the lower courts were reversed and the cause remanded with directions to enter a decree as prayed. The rulings in that case were: 1. The by-law and contract created a monopoly; 2. That it was necessary to publish news from other sources to make a check on the defendant; 3. That the by-law tends to restrict competition, because it prevents members from purchasing news from any other source; 4. That the contract and by-law are void as being beyond the power of the defendant to make; 5. That the "obligation [of the defendant] to serve the public is one not resting on contract, but grows out of the fact that it is in the discharge of a public duty or a private duty, which has been so conducted that public interest has attached thereto"; and 6. That the fact that the defendant possessed the right to use the power of eminent domain as to telegraph and telephone lines, although not exercised, contributed to determine the character of its corporate organization. And on these grounds was based the ruling that the defendant must furnish everyone applying with the same service of news. The above decision is evidently at war with the rulings in the Livestock Commission case, *supra*, where "the amount of business annually transacted at said stockyards is such as to constitute the market thus established the largest livestock market

in the world." If the facts just related did not impress the business with a public use, it is difficult to conceive what facts could do so, and in addition to the utterances heretofore quoted in the Livestock Commission case, the court there also said: "The views here expressed do not conflict with what was decided in *Munn v. Illinois*, 94 U. S. 113. ⁴⁶⁶ The question raised and decided in that case was as to the constitutionality of the act of the legislature of this state declaring certain grain elevators to be public warehouses, and prescribing rules for their management, and fixing maximum charges for the storage and handling of grain. There the legislative department had interposed and declared the public use, and the court, in holding the act constitutional, held merely that the legislative power had been properly exercised. This was the only question having any relevancy here presented in that case or which the court undertook to decide, and the discussion of the evidence showing that the business carried on in said grain elevators was of such character that it had in fact become impressed with a public use was only for the purpose of showing that a condition of things existed which justified the legislature in passing the statute then under consideration": *American Livestock Commission Co. v. Chicago Livestock Exchange*, 143 Ill. 239, 36 Am. St. Rep. 385, 32 N. E. 274.

That case clearly announces that it is necessary in cases like the present one that the legislature should declare that the business "had in fact become impressed with a public use"; something which, as there stated, the courts were powerless to declare. But that case was wholly ignored in the case under comment.

For these reasons, besides those already given during the course of this investigation, we decline to follow that case or regard its rulings authoritative.

7. There is one remaining point to be considered, and that relates to the anti-trust laws. So far as concerns those of Illinois they are not of force in this state, and as to those of the United States they must be enforced in another forum.

The law on the subject in this state prohibits "any pool, trust, agreement, combination," etc., "to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any ⁴⁶⁷ article or thing whatsoever, or the price or premium to be paid for insurance of property," or to fix or limit the produc-

tion of the things whose price may not be regulated or fixed: Rev. Stats. 1899, sec. 8965.

Nothing is discovered in this section which is at all applicable to the business in which respondent is engaged. Whether we apply to the words of the statute the rule of *notitior a sociis* (*McNichol v. United States etc. Agency*, 74 Mo. 457), or that of *ejusdem generis* (*State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842), the result must be the same.

And there is an especial reason why the ruling in this regard should be a strict one, and this is because the statute is highly penal.

Moved by these considerations, we deny the peremptory writ.

All concur.

MANDAMUS.—CONTRACT RIGHTS cannot be enforced by mandamus: *Miller v. State Board*, 46 W. Va. 192, 76 Am. St. Rep. 311, 32 S. E. 1007; note to *People v. Bowman*, 72 Am. St. Rep. 268. It does not lie to compel a city to enter into a contract, where no question of public trust or official duty is involved: Note to *State v. Rickards*, 50 Am. St. Rep. 489.

POLICE POWER—LIMITATIONS UPON.—The use of private property for a private purpose, not deleterious to public health or welfare, so as to come within proper police regulation, may be enjoyed free from legislative control: *Briggs v. Hunton*, 87 Me. 145, 47 Am. St. Rep. 318, 32 Atl. 794; *Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41. In the exercise of the police power, legislatures cannot arbitrarily invade private rights or property, nor enact laws not necessary to the preservation of the health and safety of the community: Note to *State v. Broadbelt*, 73 Am. St. Rep. 212.

STATE REGULATION OF BUSINESS.—For the evolution and diminution of *Munn v. Illinois*, 94 U. S. 113, see the monographic note to *San Diego Water Co. v. San Diego*, 62 Am. St. Rep. 289-304.

MONOPOLIES—TRUSTS—ASSOCIATED PRESS.—That the restrictions of the Associated Press, through its by-laws and contracts, whereby its members are prevented from procuring news for publication from any other source than itself, tend to create a monopoly, and are illegal and void, see *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822; and monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 264, showing what combinations constitute unlawful trusts.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

SMITH v. DENNIFF.

[24 Mont. 20, 60 Pac. 398.]

A WATER RIGHT is the legal right to use water.

WATER RIGHT DEFINED.—The right to the use of running water is a corporeal right running with riparian land, which can be acquired only by the grant, express or implied, of the owner of the land and water.

WATERS — APPROPRIATION — PUBLIC DOMAIN.—The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as owner of the land and water, and applies only to the public domain. Hence, when the title to riparian land has passed to a private individual, no right by appropriation can be acquired under the grant from Congress, and the common-law rule as to the rights of riparian owners applies, in the absence of a state statute to the contrary.

WATERS—RIGHT TO APPROPRIATE—TRESPASSERS.—Where the title to land bordering on a stream is vested in private individuals, the right to appropriate the water of such stream can be exercised only by one who has riparian rights, either as owner of the riparian land or through grant of the riparian owner, and a trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein.

WATER RIGHT ON ANOTHER'S LAND—EASEMENT.—One cannot acquire a water right on the land of another without acquiring an easement in such land.

WATERS—APPROPRIATION TO PUBLIC USE—EMINENT DOMAIN.—The right to appropriate water on the land of another for a public use may be obtained through condemnation proceedings under the right of eminent domain.

WATERS—EASEMENT APPURTENANT TO LAND.—The right to take water from or across the land of another is in the nature of an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto.

WATERS—EASEMENT—APPURTENANCE.—A DITCH ON A RIPARIAN OWNER'S LAND and the water right in it are part and parcel of the land. They cannot be easements, and, therefore, are not appurtenant to the land.

WATER RIGHT—RIPARIAN OWNER—APPURTENANCE. Where a riparian proprietor appropriates water to use on his own land, the right to have the water flow in the stream to the head of his ditch is an easement in the stream and a servitude upon upper riparian lands; hence his water right is an appurtenance to his land, and a conveyance in writing of such land passes the water right as an appurtenance thereto, if at the time he had title both to the land and the water right.

WATER RIGHT ON NONRIPARIAN LAND—EASEMENT—APPURTENANCE.—Where a nonriparian owner of land obtains the right to take water from a stream and to conduct it over the land of another, and thereby makes a valid appropriation of a water right, and uses it on his nonriparian land, such water right and ditch are easements in, or servitudes upon, the land of another, and, therefore, are appurtenances to his nonriparian land, and a conveyance of his land would pass the water right and ditch as appurtenances thereto.

WATER RIGHT—TITLE TO LAND ON WHICH WATER IS USED.—The legal title to the land upon which a water right lawfully acquired by appropriation on the public domain is used, or intended to be used, in nowise affects the appropriator's title to the water right.

EASEMENT — EXTINGUISHMENT — POSSESSION OF LAND.—Where one holds land by a defective or inchoate title, and a servitude upon or an easement in it by a valid title, the servitude or easement is not extinguished by unity of possession.

WATER RIGHT—POSSESSORY RIGHT TO RIPARIAN LAND—EASEMENT NOT APPURTENANT.—When one has a possessory right to government riparian land, and has made a valid appropriation of a water right to use on such land, such water right cannot become an appurtenance to the land until he obtains title thereto, or transfers his title to the water right to the owner of the land, since the water right, being an easement in the stream, can become legally attached as an appurtenance to the land only by a unity of title in the same person to both the dominant estate and the easement claimed.

WATER RIGHT—POSSESSORY RIGHT TO NONRIPARIAN LAND—EASEMENT NOT APPURTENANT.—One who is in rightful possession of nonriparian land under a contract with the owner, and who legally acquires a water right by appropriation thereof on the public domain for use on the land he occupies, has a legal title to the water right, distinct from his estate in the land, and such water right not being appurtenant to the land, he may execute a valid mortgage thereof, though he fails to acquire title to the land included in the mortgage, upon which the water is used.

WATER RIGHT — APPURTENANCES — BURDEN OF PROOF.—One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator.

WATER RIGHT — ABANDONMENT — MORTGAGE.—One who has lawfully appropriated water from the public domain to use on land of which he is in the rightful possession under a con-

tract with the owners does not, by mortgaging his water rights, abandon them so as to defeat the mortgagee's title.

WATER RIGHT—MORTGAGE OF—FAILURE TO USE WATER—EFFECT ON MORTGAGEE.—The fact that a mortgagee of water rights, which have been lawfully appropriated for use on the land of another of which the appropriator has rightful possession, has not used the water will not defeat an action by him against the owner of the land to obtain the possession and use of such water rights, since until foreclosure the mortgagee had no right to possession.

G. B. Winston and W. H. Trippel, for the appellant.

H. R. Whitehill, for the respondent.

²¹ **PIGOTT, J.** After the opinion heretofore rendered in this case (*Smith v. Denniff*, 23 Mont. 65, 57 Pac. 557), the court of its own motion granted a rehearing. Additional briefs and oral arguments have been filed and made, and we are satisfied upon further consideration that the conclusion announced in the former opinion is erroneous.

The ultimate question presented for decision is whether a certain water right is appurtenant to a certain parcel of land. As preliminary to the determination of this question, it is necessary to investigate the nature of a "water right," how title to the same may be acquired, the character of its ownership, and its relation to other real property.

1. A water right may be defined to be the legal right to use water. The right to the use of running water is a corporeal right or hereditament which follows or is embraced by the ownership of riparian soil. It is a corporeal right running with riparian land: *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532. A water right can therefore be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as owner of the land and water; such grant has been made by Congress: *Wood v. Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726; *Welch v. Garrett* (Idaho), 51 Pac. 405. This grant by the government applies, however, only to the public domain owned by the United States: *Note to Heath v. Williams*, 43 Am. Dec. 280, 25 Me. 209; therefore, where the absolute title to riparian soil on a stream has passed from the United States before any right to the water by prior appropriation has become vested in any person, no such right can be acquired afterward under the grant of Congress; and the com-

mon-law rule as to the rights of riparian owners would apply were it not for the fact that the state of Montana has by necessary implication assumed to itself the ownership, sub modo, ²² of the rivers and streams of this state, and by section 1880 et seq. of the Civil Code has expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this state as owner of the water. But this privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land, or through grant of the riparian owner. A trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein by virtue of section 1880 et seq. of the Civil Code: *Alta Land Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645. One may not acquire a water right on the land of another without acquiring an easement in such land: *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659; and an easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing or by prescription: Civ. Code, sec. 1500; *Great Falls Waterworks Co. v. Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963. Nothing here said is to be understood as a modification of the doctrine of *McDonald v. Lannen*, 19 Mont. 78, 47 Pac. 648, or of *Wood v. Lowney*, 20 Mont. 273, 50 Pac. 794. The right to appropriate water on the land of another for a public use may be obtained through condemnation proceedings under the right of eminent domain: *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659. In California it cannot be so obtained for a private use: *Lorenz v. Jacob*, 63 Cal. 73. Under section 15, article 3, of the constitution of Montana, the use of appropriated water is made a public use: *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757. By section 1880 et seq. of the Civil Code the right is conferred upon anyone to make a valid appropriation of water on the unsold state lands: *Wood v. Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726. But such permission can and does apply only to lands owned by the state. As owner of the stream, it has granted the ²³ right to appropriate the water of the stream, yet it does not pretend to legalize the exercise of such privilege, in violation of the vested rights of other

land owners; as well might it be said that by reason of the game laws, permitting all persons to fish in the streams of this state, it therefore follows that anyone has a vested right to exercise this privilege wherever there is a stream, in defiance of the vested rights of the property owners—that is to say, by reason of the game laws a land owner has no rights which a fisherman is bound to respect. The mere statement of such a proposition is a demonstration of its fallacy. It is, therefore, apparent that absolute legal title to a water right can only be acquired by grant, express or implied, of the riparian owner of the land and water.

It may be remarked, obiter, that the common-law doctrine of riparian rights assured to each riparian owner the right to the reasonable use, without substantial diminution in quantity or deterioration in quality to the detriment of other riparian proprietors, of the water of a stream flowing by or over his land. The doctrine of "prior appropriation" confers upon a riparian owner, or one having title to a water right by grant from him, the right to a use of the water of a stream which would be unreasonable at the common law, and to this extent the doctrine of prior appropriation may be said to have abrogated the common-law rule.

2. Section 1078 of the Civil Code defines an "appurtenance" as follows: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another." A "watercourse from or across the land of another" is an easement, and by reference to section 1250 of the Civil Code it is plain that in the contemplation of the code an appurtenance to land is in any and every case an easement. For example: A owns a parcel of land, to irrigate which he has lawfully appropriated, and by right is using, water. The ditch through which the water is conveyed is also owned by ²⁴ him, and is partly upon his land and partly upon the land of B. The water right is an appurtenant to A's land, and that part of the ditch which is upon B's land is an easement of A therein, and is also appurtenant to the land of A, but that part of the ditch which is upon A's land is not appurtenant thereto, but is part and parcel of the land itself.

A legal appropriator of water may change the place of its use, and may use the water for other purposes than that for which it was originally appropriated: Civ. Code, sec. 1882;

Woolman v. Garringer, 1 Mont. 544; *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; *Fuller v. Swan River etc. Min. Co.*, 12 Colo. 12, 19 Pac. 836. The right thus acquired to take water from or over the land of another is therefore in the nature of an easement in gross (Civ. Code, sec. 1251, subd. 6; *Bank v. Miller*, 7 Saw. 168, 6 Fed. 545; *De Witt v. Harvey*, 4 Gray, 488; *Goodrich v. Burbank*, 12 Allen, 462, 90 Am. Dec. 161), which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto.

For the purpose of illustrating the practical application of the foregoing principles, we shall consider a few cases of common occurrence:

(a) A has absolute title in fee to riparian land. Under the statutes of Montana he is clothed with the right, by compliance with the provisions of the statute, to appropriate a water right, subject, of course, to the vested rights of prior appropriators. Now, being the owner of riparian land, he can, as has been shown, legally exercise this privilege on his own land; and when he has perfected such inchoate right by fulfilling the requirements of the statute, the legal title to such water right becomes vested in him—not, however, by reason of any common-law riparian rights as owner of the soil, but by reason of statutory grant. Title to the land and title to the water right are in A's case two distinct things, each derived from a separate source. The question now presents itself: Is the water right thus acquired by A an appurtenance to the land of A upon which it is used? We have already²⁵ attempted to show that an appurtenance to land under the laws of Montana must be an easement. In this case A owns the land bordering on the stream as well as under it; his water right and ditch are on his own land, and as a servitude or easement thereon cannot be held by the owner of the servient tenement (Civ. Code, sec. 1254), and as a servitude is extinguished or merged by the vesting of the right to the servitude and the right to the servient tenement in the same person (Civ. Code, sec. 1260), it might seem as if it were impossible that A's water right and ditch could be an appurtenance to A's land. So far as A's ditch on his own land and the water right in it are concerned, it is self-apparent that they cannot be easements, and they are therefore not appurtenant to the land; they are part and parcel of the land. The right to the use of the running water—that is, the right to appropriate water on

one's own land—is a corporeal hereditament; but the water when once appropriated includes and comprehends an incorporeal hereditament, to wit, the right to have the water flow in the stream, without diminution or deterioration, to the head of the ditch or place of diversion—an easement in the stream, and a servitude upon upper riparian lands: Civ. Code, sec. 1250, subd. 11; *Lower King's River Water Ditch Co. v. King's River etc. Canal Co.*, 60 Cal. 408; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Wyatt v. Larimer etc. Irr. Co.*, 18 Colo. 298, 315, 36 Am. St. Rep. 280, 33 Pac. 144. The water right of A, therefore, being confessedly by right used with his land, could be an appurtenance thereto, and upon a conveyance in writing of the land by A, no reservation being made in the deed, such water right, being attached to the land, would pass as an appurtenance thereto if at the time of the conveyance of the land A had title to both land and water right.

(b) B owns nonriparian land. He cannot, therefore, take up a water right on his own land. He has, however, by statutory grant, the privilege of appropriating water upon the public domain or upon land owned by the state; if, however, there is no such land of which he can avail himself for the ²⁶ purpose of appropriating a water right, then, of necessity, he must acquire by grant, express or implied (or by condemnation under the power of eminent domain), from some riparian owner the right to exercise the statutory privilege—that is to say, he must acquire an easement in or a servitude upon the land of another, for without an easement in or a servitude upon the property of another, B cannot possibly lawfully acquire a water right (*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659); and such can be acquired only by an instrument in writing. In the case of B certain distinctions must be kept in mind; the right to an easement in the stream is derived from statutory grant; the means of acquiring this right he must obtain from a riparian owner; the latter embraces two things: 1. The right to divert the water on the land of the grantor; and 2. The right to conduct the water across the land of the grantor. A grant of the first right would doubtless carry with it the right to convey the water across the grantor's land; that is, a right of way for the water over the land. It would be an easement of necessity. On the other hand, a mere grant by a riparian owner of a right of way for conducting water over the land of the grantor would not convey to the grantee the right to appropriate or divert water on

the land of the grantor: *Zimmmer v. San Luis Water Co.*, 57 Cal. 221. If, however, B does properly obtain the right to appropriate on and conduct water across the land of another, or if he does so over the public domain or state lands, and thereby makes a valid appropriation of a water right, and uses the same on his nonriparian land, in either case such water right and ditch is an easement in or servitude upon the land of another, and is therefore an appurtenance to his nonriparian land, title to the easement and title to the dominant estate being both united in B; and upon a conveyance of his land the water right and the ditch would pass as appurtenances thereto, provided no reservation thereof is made in the deed.

(c) C has possessory right to government riparian land. In this case C, of course, has the privilege, by statutory grant, of appropriating a water right for the land which he ²⁷ occupies, and when appropriated in compliance with the requirements of the law, the legal title to such water right becomes vested in him. It is a positive, certain, and vested property right, for the legal title to the land upon which a water right lawfully acquired by appropriation on the public domain is used, or intended to be used, in nowise affects the appropriator's title to the water right: *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 45 Pac. 168. The water right thus acquired by C is, as we have already shown, an easement in the stream, and until he acquires title a burden upon the land which he occupies but does not own, the title to which double easement (or to the easement and servitude) becomes vested in him by virtue of the grant of the government. The servitude upon the land under such circumstances does not become merged or extinguished by reason of his being in possession of the land, for where one holds land by defective or inchoate title, and a servitude upon or an easement in it by a valid title, the servitude or easement is not extinguished by unity of possession: *Tyler v. Hammond*, 11 Pick. 193; nor can it be technically an appurtenance to the land upon which it exists, for, as we have seen, a burden or servitude, to be appurtenant to the land, must be a burden or servitude upon other land. Under these circumstances, if C obtains title to the land from the United States, his servitude upon or easement in the land is immediately extinguished (Civ. Code, sec. 1260), and becomes part and parcel of the land; but before he acquires title to the land his servitude thereon or easement therein is a vested interest in the public domain,

and can only be transferred by an instrument in writing. Now, as to his water right, viewed only as an easement in the stream: This, as we have seen, is an incorporeal hereditament—an easement not attached to land, and therefore akin to an easement in gross at the common law, title to which is vested in C. But an easement, to be appurtenant to a parcel of land, must be attached to the dominant estate: *Swazey v. Brooks*, 34 Vt. 451; *Spaulding v. Abbot*, 55 N. H. 423; *Crooker v. Benton*, 93 Cal. 366, 28 Pac. 953; ²⁸ *Green v. Collins*, 20 Hun, 474, 86 N. Y. 246, 40 Am. Rep. 531; *Ward v. Farwell*, 6 Colo. 66. It can become legally attached only by unity of title in the same person to both the dominant estate and the easement claimed: *Meek v. Breckenridge*, 29 Ohio St. 642. C's water right, therefore, cannot become an appurtenance to the land of which he is possessed until he obtains title thereto from the government, or transfers his title to his water right to the owner of the land, and such transfer can be made by an instrument in writing only.

(d) D has possessory right to government nonriparian land. If D lawfully acquires a water right upon the public domain, and conducts water by a ditch over the public domain to the land which he occupies, and uses the same thereon, it is clear, from the results reached in the foregoing discussion, that such water right and ditch will not become an appurtenance to the land occupied by D until he obtains title thereto from the government, or conveys his water right and ditch to the owner of the land.

With the foregoing established legal principles kept in mind, let us proceed to the consideration of the case at bar. At the very outset of the investigation of the record in this case the language of the court in *Wood v. Lowney*, 20 Mont. 275, 50 Pac. 794, is most apt: "Our labors in the case before us would have been somewhat simplified, and, indeed, would be generally simplified in water right cases, by having incorporated into the record a diagram of the situation of the ditches over which the litigation has arisen."

The record does not clearly disclose, but upon the oral argument counsel conceded, that Cosins appropriated the water from the public domain, and that he was then in possession of a certain parcel of nonriparian land under a contract with its owner; what the contract was does not appear; he was, however admittedly in rightful possession of the nonriparian land, the title to which was in another. His water right was legally

acquired by an appropriation thereof on the public domain; he conducted the water by means of a ditch over the public domain to the land he was occupying, and used the water thereon. It is conceded that he made a valid appropriation of the water, and, as we have endeavored to show, the legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in nowise affects the appropriator's title to the water right, for the bona fide intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated: Civ. Code, sec. 1882; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472. Title to the water right and ditch, therefore, vested in Cosins, and this precludes the possibility of their passing to the Northern Pacific Railway Company, the owner of the land, as appurtenances to the land, without a conveyance in writing. One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator. The water right of Cosins was property distinct from his estate in the land of the railway company upon which he was using the water, and his design, successfully executed, was to mortgage the water right, even if he should fail to acquire title to the land included in the mortgage, and upon which the water was then being used.

In the case at bar the defendant does not assert or pretend that there ever was any conveyance by Cosins of his water right to the Northern Pacific Railway Company, the owner of the land; and since an easement can only become legally attached to land by unity of title in the same person to both the dominant tenement and the easement claimed, it is apparent that the Northern Pacific Railway Company could not grant or convey the water right to the defendant as an appurtenance to its land, for the reason that it has never owned the same, and therefore the right and ditch have never been legally attached as appurtenant to the land now occupied by the defendant: ³⁰ Bliss v. Kennedy, 43 Ill. 67; Manning v. Smith, 6 Conn. 289. The water right, not being owned by the railway company, did not constitute a part of its estate. Section 1078, supra, may not be interpreted to mean that a water

right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as intended, become inseparably attached as an appurtenance, and the appropriator thereby lose his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of section 1882 of the Civil Code.

The common-law rule that an easement acquired by a tenant as an appurtenance to the land inures to the benefit of the landlord upon the expiry of the tenancy (*Dempsey v. Kipp*, 61 N. Y. 462) is, for the reasons we have stated, inapplicable to cases arising under the statutes in respect of prior appropriation of water rights; but even if it were held to apply in a qualified sense, it could at the most affect only the ditch as an easement, and it would by no means follow that the water right of Cosins has become an appurtenance to land in section 17: *Philbrick v. Ewing*, 97 Mass. 133. The water right is in no sense so incident or attached to the land in section 17 upon which it was used as to be incapable of use apart from that land.

The contention that Cosins abandoned his water right by executing a mortgage thereof cannot be successfully urged in this case: *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054. Some argument is advanced that neither the plaintiff nor his assignor, the mortgagee, was actually using the water; but this fact is immaterial. It, of itself, does not impair plaintiff's present right to the possession and use of the water. Plaintiff or his assignor never was entitled to possession until after foreclosure and sale; the right to the possession was meanwhile vested in Cosins. The defendant's possession prior to the sheriff's deed will not be presumed to be wrongful—indeed, he asserts rightful possession—and he ³¹ will be presumed to be the licensee or tenant of Cosins in the water right, and when his licensor's or landlord's right to possession ceased, his own fell with it.

The judgment is reversed and the cause remanded.

Mr. Chief Justice Brantly, being disqualified, took no part in this decision.

THE RIGHT TO RUNNING WATER is a right running with the land, a corporeal privilege bestowed upon the occupier or appropriator of the soil, and has none of the characteristics of mere personalty: *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140. See, too,

Cary v. Daniels, 8 Met. 466, 41 Am. Dec. 532; **Goodrich v. Burbank**, 12 Allen, 459, 90 Am. Dec. 161. The right of a riparian owner to the natural flow of a stream passes by a grant of the land, unless specially reserved. It is not an easement in, nor an appurtenant to, the land, but is as much a part of the soil as stones scattered over it: **Benton v. Johncox**, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495.

WATERS.—THE RIGHT TO APPROPRIATE waters applies only to the public lands, and cannot be exercised to the prejudice of the rights of riparian proprietors: **Benton v. Johncox**, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495. See, further, the monographic note to **Heath v. Williams**, 43 Am. Dec. 280.

WATERS.—ON ABANDONMENT of appropriations of water, see **Wimer v. Simmons**, 27 Or. 1, 50 Am. St. Rep. 685, and note, 39 Pac. 6.

THE WATER OF A STREAM MAY BE CONDEMNED in the exercise of the power of eminent domain: **St. Helena Water Co. v. Forbes**, 62 Cal. 132, 45 Am. Rep. 659.

DIETRICH v. MARTIN.

[24 Mont. 145, 60 Pac. 1087.]

VESSELS—WHAT IS A "BOAT"—ATTACHMENT.—A statute relating to the attachment of boats and their liability for certain debts does not apply to a steam dredge and amalgamator used solely for mining purposes and called a "boat." Hence, where a plaintiff recovers judgment under such statute against such boat, which is retaken by the defendant on a redelivery bond, the plaintiff cannot recover on such bond, since the court was without jurisdiction to render the original judgment.

Luce & Luce, for the appellant.

R. Lee Word and Robert B. Smith, for the respondents.

146 PER CURIAM. In 1891 plaintiff commenced an action in the district court of the ninth judicial district against a "steam dredge and amalgamator," an alleged "boat," described in the complaint as having been used as a steam dredge or shovel, with an amalgamator attached, for dredging streams, and which was at the time of attachment upon the Jefferson river, a non-navigable stream, in the county of Gallatin, state of Montana. Plaintiff in that action proceeded under chapter 5 of title 7 of the first division of the Code of Civil Procedure (Comp. Stats. 1887), relating to the attachment of boats, and their liability for certain debts. Summons and warrant

for attachment were issued, and attempted service and levy had upon the said boat, under the statutes just referred to. The defendant gave to the sheriff a bond to discharge the "boat" from the levy, and it was thereupon discharged, as provided for by section 217 of the law mentioned. On January 28, 1892, judgment was rendered in favor of plaintiff in said action; and, appeal having been taken therefrom to this court, said appeal was dismissed on March 26, 1894: *Dietrich v. Steam Dredge etc.*, ¹⁴⁷ 14 Mont. 261, 36 Pac. 81. This present action was brought by the plaintiff to recover upon the bail bond which had been given by the defendants for the release of the said "boat." One of the defenses pleaded was want of jurisdiction in the court to render the judgment of January 28, 1892. Upon the trial the district court sustained defendants' motion for a nonsuit upon the ground, among others, that the complaint in the original action did not state facts sufficient to sustain a judgment against the defendants. Judgment was rendered for the defendants. The plaintiff now appeals from said judgment, and from an order overruling his motion for a new trial.

It is only necessary to pass upon a single point, inasmuch as our opinion thereon will dispose of the case. Chapter 5 of title 7 of the first division of the Compiled Statutes of 1887, relating to the attachment of boats, never was intended to apply to a steam dredge and amalgamator used for mining purposes, and called a "boat." It is entirely clear to us that such a "boat" is but a piece of mining machinery. The statutes referred to affect the liability of boats having contracts of affreightment, or contracts relative to the transportation of persons or property, and perhaps refer to other water craft used upon the streams and lakes in the state. Plaintiff ought to have proceeded in the ordinary way to secure a debt, and not by invoking a special statute which in no way can be extended to embrace mining implements used in the extraction of the precious metals from the gravel of the state.

Being thoroughly satisfied that the facts stated in *Dietrich v. Steam Dredge etc.*, 14 Mont. 261, 36 Pac. 81, excluded that case from the provisions of the special statute (Comp. Stats. 1887, c. 5, tit. 7), upon which the pleading was drafted, and that the court was without jurisdiction to proceed under said chapter to judgment against the supposed "boat," the order and judgment appealed from must be affirmed.

STEAM DREDGE.—NO LIEN CAN BE ENFORCED against a steam dredge for labor and materials furnished in its construction, under a statute giving such a lien upon "every watercraft used, or intended to be used, in navigating the waters of this state": *Bartlett v. Steam Dredge*, 107 Mich. 74, 61 Am. St. Rep. 314, 64 N. W. 951.

HOLTER HARDWARE COMPANY v. ONTARIO MINING COMPANY.

[24 Mont. 198, 61 Pac. 8.]

MECHANIC'S LIEN—OIL FOR MINING MACHINERY.—Under a statute providing that every person furnishing material for any machinery, fixture, or building has a lien therefor, illuminating oil, mica grease, lubricating oil, and gasoline for fuel, used in a mining plant, are not lienable, since each is consumed in use, and does not add to the value nor become a part of the property on which it is used.

F. M. McIntyre, for the appellant.

McConnell & McConnell, for the respondents.

¹⁹⁰ **PER CURIAM.** This action was brought to foreclose a materialman's lien against the defendant Ontario Mining Company, the Continental Oil Company, the appellant, being one of the defendants. This defendant sought to enforce a lien against the real property of the Ontario Mining Company for the price of sundry materials furnished to it between the first day of January, 1896, and the sixteenth day of June, 1896, the claim of lien having been filed on the thirty-first day of July, 1896. ²⁰⁰ The supposed rights of the Continental Oil Company were contested by the Merchants' National Bank and one Hershfield, claiming interests in the property of the mining company by virtue of attachments and executions against it. Upon trial the Continental Oil Company obtained a judgment against the mining company for the amount of its claim of two hundred and sixty-seven dollars and sixty-seven cents, with interest, but only twenty-two dollars and sixty-eight cents of that amount, with interest from August 1, 1896, and attorneys' fees, was decreed to be a lien upon the real estate of the debtor. The court found that each month's sales were separate and independent accounts, and that the appellant was not entitled to a lien for the value of any materials not furnished within ninety days next before the time when the state-

ment of lien was filed, and that none of the articles are of a lienable nature, except the gasoline for fuel in the assay office in connection with the mill and concentrator. Some of the gasoline had been furnished more than ninety days before the statement of lien was filed. The appeal is from the order denying a new trial and from so much of the judgment as fails to allow a lien for the whole account.

We find it unnecessary to determine whether or not the account in suit is made up of a series of independent contracts, or whether or not the purchases during each month constitute separate and independent accounts. The articles furnished for which a lien is claimed consist of coal oil for illuminating purposes, mica grease and oil for lubricating purposes, and gasoline used for fuel. We are satisfied that no one of these is of a lienable nature. Each is consumed in use, neither adding to the value, nor becoming parcel, of the property upon which it is used. Section 2130 of the Code of Civil Procedure does not, by any fair construction, include the materials for which a lien is sought to be enforced in the case at bar. The statute creating the right of the materialman to acquire a lien is the outgrowth of the principle that he who furnishes that which becomes a constituent part of real property, and is intended to enhance its value, should be given security for the price or worth thereof. The doctrine is well stated by Mr. Justice Brewer in *Central Trust Co. v. Texas etc. Ry. Co.*, 23 Fed. 703: "The language of the statute contains the word 'fuel,' in addition to the words 'labor and material'; and it is claimed that the use of the word 'fuel' enlarges the meaning of the word 'material,' and makes it broad enough to cover all supplies furnished. But for that word 'fuel,' there would be no question. The idea which underlies these lien statutes is that because the labor and the material have gone into the building of the road or structure, and to that extent added to its value, therefore a lien for such labor and material should be given to him who does the one and furnishes the other. . . . While we may be compelled to follow the language of the statute and give for the fuel furnished a lien, yet I think in the construction of these statutes we should start from the underlying thought of giving security to him who adds to the value of the road, and that we should never carry the statute beyond that, unless imperatively demanded by the language used." The Wisconsin statute provides that every person who furnishes any materials in or about the erection, construction,

protection, or removal of any machinery which is or becomes a part of the freehold, shall have a lien for such materials. In *Standard Oil Co. v. Lane*, 75 Wis. 636, 44 N. W. 644, the court said: "The statute seems to go on the principle that materials used and labor performed on machinery, which enhance its value and become a part of such machinery, should be entitled to a lien. This appears to be the object of the statute. It is clear that it is not everything used in operating machinery, and which tends to preserve it, that is embraced within the meaning of the statute. Many things may serve to preserve machinery and make it operate more efficiently and easily which do not protect it in the sense of the statute." We affirm the doctrine announced in these cases, as based upon correct principle.

The judgment and order appealed from are affirmed.

Mr. Chief Justice Brantly, being disqualified, takes no part in this decision.

MECHANIC'S LIEN LAW, HOW CONSTRUED.—While a mechanic's lien law is favored and the remedial laws for its enforcement should be construed liberally, they should not be construed so as to include persons not enumerated in the statute: *Thompson v. Baxter*, 92 Tenn. 305, 36 Am. St. Rep. 85, 21 S. W. 668. As illustrating this principle, see *Bradshaw v. Jones*, 103 Tenn. 331, 76 Am. St. Rep. 655, 52 S. W. 1072; *Perrault v. Shaw*, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724.

VINCENT v. VINEYARD.

[24 Mont. 207, 61 Pac. 131.]

HOMESTEAD—VALUE—EFFECT OF EXCESS.—Under a statute providing that a homestead consists of the dwelling-house and the land on which it is situated, that the quantity of land selected shall not exceed a certain amount or value, and that from the time the declaration is filed the premises therein described constitute the homestead, with provisions as to the method of subjecting the excess value of a homestead to execution, the homestead character is impressed upon all the property described in the declaration of homestead, although its value exceeds the amount allowed.

HOMESTEAD—JUDGMENT LIEN—MORTGAGE OF HOMESTEAD.—Where judgments constitute liens upon real property, and the homestead law provides that homesteads shall be subject to execution in satisfaction of judgments obtained before the declaration of homestead is filed, and which constitute liens upon the property therein described, but that no judgments obtained prior to a certain date shall constitute liens upon the property, a judg-

ment docketed prior to such date is not a lien upon a homestead acquired subsequent to such date, whatever its value, and a mortgage of the homestead takes precedence over such judgment.

HOMESTEAD — JUDGMENT CREDITORS — EXCESS VALUE OF HOMESTEAD.—Under the statutes of Montana authorizing a judgment creditor without a lien to subject the value of a homestead above two thousand five hundred dollars to the satisfaction of his claim, such a creditor must present a verified petition to the court or judge showing that an execution has been levied upon the homestead and that the value of the homestead exceeds the amount of the exemption; after proof of these facts and of notice to the homestead claimant, the judge must appoint appraisers, and upon their report that the value of the homestead exceeds two thousand five hundred dollars, and that the property can be divided without injury, execution can be enforced against the excess, but if the property cannot be divided, a sale must be ordered and the execution paid from the excess over two thousand five hundred dollars.

HOMESTEAD—MORTGAGE OF—SATISFACTION OF.—The mortgage of a homestead operates as a waiver of the homestead exemption in favor of the mortgagee and of those claiming under him, but the waiver does not inure to the benefit of other persons. Therefore, such a mortgagee is not required to satisfy his mortgage debt out of the amount representing the homestead exemption, as against judgment creditors who have no lien on the homestead property.

HOMESTEAD—MORTGAGE OF—PAYMENT.—The entire homestead is subject to sale in satisfaction of judgments obtained on debts secured by mortgages on the premises, and which are recorded before the filing of the declaration of homestead.

Action to recover as assignor of a homestead mortgage. Judgment for the plaintiff. Defendants appeal. On the first day of April, 1892, a judgment in favor of Dellinger, one of the defendants, against the defendants Vineyard, was docketed, so as to constitute it a lien upon the nonexempt real property of the Vineyards. They occupied as a homestead the east half of lot 3 of block 37 in the city of Anaconda. This property never exceeded in value \$2,000 until after the thirteenth day of July, 1895, on which date the Vineyards made a mortgage thereon to Carroll to secure the payment of a note for \$2,000. On the eleventh day of December following, they, being husband and wife, filed for record their declaration selecting and claiming the real estate in question as their homestead. On the ninth day of January, 1896, a writ of execution was issued on the judgment docketed in favor of Dellinger. Upon his application the district judge appointed appraisers to appraise the value of the homestead. They reported that the property could not be divided without material injury, and that the value was \$4,650. The judge thereupon made an order directing the sale of said real estate under the execution,

and on the nineteenth day of March, 1898, by virtue of an alias execution, a sale was made to Dellinger for \$5,500, he paying the money to the sheriff, who paid into court \$2,500 for the Vineyards as representing their homestead, and the remainder to Dellinger. Afterward, the plaintiff, to whom Carroll had assigned the mortgage, commenced the present action, joining as defendants Dellinger and the sheriff who made the sale. The court awarded judgment against the Vineyards for \$1,277.14, the amount remaining unpaid of the debt mentioned in the mortgage, and found that Dellinger was the owner of the real estate, subject to the right of redemption in the Vineyards. To these parts of the judgment there is no objection. The court further decreed that Dellinger's ownership of the property was subject to the mortgage lien in favor of Vincent, and that Dellinger was entitled to the whole of the surplus arising from the sale of the property above, the homestead exemption of \$2,500 and the mortgage lien of \$1,277.14, attorneys' fees, and costs. Dellinger and the sheriff appealed, asserting that this part of the judgment is erroneous.

William H. De Witt and T. Bailey Lee, for the appellants.

H. R. Whitehill, for the respondents.

212 PIGOTT, J. The error assigned is that the district court adjudged the mortgage of Vincent to be a lien superior to the judgment of Dellinger, whereas the judgment should have been ranked superior to the mortgage and next below the homestead exemption of \$2,500. The single question, therefore, is whether the lien of the docketed judgment attached to the land selected as a homestead for its value over \$2,500, the amount of the homestead exemption. Dellinger contends that the judgment became a lien upon the land on the first day of April, 1892, when it was docketed, and remained such lien ever thereafter, subordinate only to \$2,500 worth of the land, and this contention is founded upon section 307 of the first division of the Compiled Statutes of 1887, and section 1197 of the Code of Civil Procedure of 1895, which are, in substance, the same, each providing that "from the time the judgment is docketed it becomes [or "it shall become"] **213** a lien upon all [or "the"] real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the [or "said"] lien ceases [or "expires"]. The lien continues [or "shall con-

tinue"] for six years, unless the judgment be previously satisfied." Prior to July 13, 1895, the value of the homestead did not exceed the amount of the homestead exemption, and counsel on both sides invoke the provisions of the Civil Code of 1895 and agree that the statutory enactments in force in 1892, when the judgment was docketed, are (with the exception of section 307, *supra*) not necessary to be considered. No objection is made to the application of the homestead law of 1895 to the judgment docketed in 1892. We quote the following sections of title 5, part 4, division 2, of the Civil Code of 1895:

"Sec. 1670. The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

"Sec. 1693. Homesteads may be selected and claimed: 1. Consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling-house thereon and its appurtenances, and not included in any town plot, city, or village; or 2. A quantity of land not exceeded in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling-house thereon and its appurtenances. Such homestead, in either case, shall not exceed in value the sum of two thousand five hundred dollars."

"Sec. 1701. The declaration of homestead must contain: . . . 2. A statement that the person making it is residing on the premises and claims them as a homestead; 3. A description of the premises; 4. An estimate of their actual cash value."

"Sec. 1703. From and after the time the declaration is filed for record the premises therein described constitute a homestead. Upon the death of the person whose property was selected as a homestead, it shall go to his or her heirs or devisees, subject to the use of the widow during her life, if ²¹⁴ the property selected as a homestead, before selection, belonged to the husband; and subject to the use of the husband during his life, if the property selected as a homestead before selection belonged to the wife. And in no case shall the homestead be held liable for the debts of the owner, except as provided in this title."

By subdivision 3 of section 1679 the petition for an appraisalment of the homestead levied upon for the enforcement

of certain judgments must show that "the value of the homestead exceeds the amount of the homestead exemption."

From these sections it is clear that the homestead consists of the real property described in the declaration of homestead, although its value exceeds \$2,500—in other words, the homestead attribute or character is impressed upon all the property described in the declaration. Section 1673 declares that the homestead is exempt from execution or forced sale except as is provided in title 5, part 4, division 2, of the Civil Code. Under what circumstances may it be subjected to sale on execution? Section 1674 provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained before the declaration of homestead was filed, and which constitute liens upon the property therein described, but that no judgments obtained before July 1, 1895, shall constitute liens upon the property. By this section the homestead may be sold under an execution issued upon a judgment rendered and docketed after July 1, 1895, and before the filing of the declaration of homestead, and the entire proceeds must, if necessary for that purpose, be paid in or toward the satisfaction of the judgment lien; in such case there is no homestead exemption, for the section does not recognize its existence. Express language excludes from the benefit of this section judgments obtained prior to July 1, 1895; though docketed, they are not liens upon the real property described in the declaration of homestead, whatever its value. This inevitably results from the fact that the property so described is, regardless of its value then or afterward, the homestead. The homestead is not \$2,500 worth of the realty ²¹⁵ described in the declaration; on the contrary, it is the realty so described. The only limit is in respect of the area, which must not exceed the statutory size: *Yerrick v. Higgins*, 22 Mont. 502, 57 Pac. 95. The judgment, having been obtained prior to July 1, 1895, was not a lien upon the homestead; consequently, the latter is not liable, by virtue of anything contained in section 1674, to execution sale in satisfaction of the former.

Judgments other than those constituting liens upon the homestead may be enforced by a compliance with sections 1678-1689. In these sections the homestead exemption is recognized, and provision made whereby the excess in value of the homestead in fact may be subjected to the demands of creditors. Section 1678 provides: "When an execution for the enforcement of a judgment obtained in a case not within the

classes enumerated in section 1674 is levied upon the homestead, the judgment creditor may apply to the district court of the county in which the homestead is situated, or a judge thereof, for the appointment of persons to appraise the value thereof." Upon an application, supported by a verified petition to the district court or its judge, showing that an execution has been levied upon the homestead, the name of the homestead claimant, and that the value of the homestead exceeds the amount of the homestead exemption, the judge, after proof of notice to the claimant, and of the facts stated in the petition, must appoint appraisers to value the homestead; if from their report it appears that the land can be divided without material injury, the judge must order the appraisers to allot the claimant so much of the homestead as will amount in value to the homestead exemption, and the execution may then be enforced against the remainder of the land. But if it appears that the land exceeds in value the amount of the homestead exemption, and that it cannot be divided, the judge must order its sale under execution, at which sale no bid less than \$2,500 shall be received, and the proceeds to the amount of the exemption must be paid to the claimant, and the remainder applied on the execution. Until ²¹⁶ the value of the homestead is so ascertained to be in excess of \$2,500, the entire property covered by the declaration of homestead, whatever its worth, remains exempt from sale on execution, and therefore the lien of a docketed judgment cannot attach. The levy of execution initiates the right to maintain proceedings for an appraisal and sale under the statute.

The foregoing interpretation is in harmony with that announced in *Barrett v. Sims*, 59 Cal. 615, *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. 1145, and in *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, 24 Pac. 852. The legislative assembly of Montana adopted sections 1670-1703 of the Civil Code of 1895 from California, in whose Civil Code they appear as sections 1237-1265: *Yerrick v. Higgins*, 22 Mont. 502, 57 Pac. 95. In transplanting the homestead law of California to Montana, reference to community property was eliminated, the value of the homestead exemption was reduced to \$2,500, and a limit upon area fixed; and section 1241 of the California Civil Code was changed by the addition of the words, "but no judgment obtained before this code takes effect shall constitute such lien," so that section 1674, *supra*, differs in this respect from the last-named section of the Civil Code of Cali-

fornia, of which it is otherwise a copy. In *Barrett v. Sims*, 59 Cal. 615, the supreme court of California interpreted the sections under consideration before the adoption of them by this state. That interpretation is conformable to the intent of the statutes.

The case of *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649, is also in point. In that state the lien of judgment impresses the "lands, tenements, and hereditaments liable to be sold upon execution"; and the homestead act declares that real property coming within its protection is exempt from attachment and execution. After deciding that, as between a judgment creditor and his debtor in possession of a homestead within the statutory size and value, the judgment is not a lien on the homestead property, the court inquires whether the lien reaches the surplus value. The court holds that, if the property claimed as a homestead exceeds in value ²¹⁷ the homestead exemption, the excess must be ascertained, and the true homestead set apart, before the excess can be subjected to sale on execution; and, therefore, that the lien of a judgment cannot attach to the surplus value of the homestead until ascertained by admeasurement of the homestead exemption.

We are aware that the courts of several states have decided that judgment liens impress the value of the homestead in excess of the homestead exemption. Most of the decisions have been upon statutes so different from those contained in the Civil Code of Montana that we do not regard them as persuasive in this jurisdiction.

A suggestion is made that the plaintiff should have been required to satisfy the amount of his mortgage debt out of the \$2,500 paid into court as representing the homestead exemption of the Vineyards. A sufficient answer to this suggestion seems to be that the mortgage operated as a waiver of the homestead exemption in favor of the mortgagee and those claiming under him, which waiver did not inure to the benefit of other persons. The mortgagors did not agree that the debt owing to Dellinger might be satisfied out of the exemption. The willingness to secure the payment of Vincent's demand by mortgaging the homestead, and thereby waiving the exemption, cannot be deemed to evince a like disposition in respect of Dellinger. The entire homestead is subject to sale in satisfaction of judgments obtained on debts secured by mortgages on the premises recorded before the filing of the declaration of home-

stead (section 1674, subdivision 4); the Vincent mortgage is within this statute, but the homestead exemption of \$2,500 is beyond the reach of such a judgment as Dellingers. Vincent had the right to release the homestead exemption from the lien of his mortgage, and retain it upon the surplus of the homestead; had he done so, no right of Dellinger would be invaded, for all Dellinger could have seized by his execution was the remainder of the surplus after the satisfaction of Vincent's mortgage debt. To compel Vincent to resort first to the homestead exemption would be to subject ²¹⁸ it indirectly to the payment of Dellinger's judgment, and thus, contrary to the intent of the parties to the contract embraced in the mortgage, the waiver would practically be construed as having been made in favor of Dellinger. Section 3772 of the Civil Code does not confer upon Dellinger the right which he asserts.

The mortgage of Vincent having been executed and recorded prior to the acquisition by Dellinger of any lien upon the real estate selected as a homestead, it follows from the views expressed that the judgment of the district court must be affirmed, and it is so ordered.

Mr. Chief Justice Brantly, being disqualified, took no part in the foregoing decision.

HOMESTEAD.—THE EXCESS of a homestead over the amount allowed by law is subject to judgment liens: See the monographic note to Vanstony v. Thornton, 34 Am. St. Rep. 505. But see this note, p. 506; and consult, also, the notes to Sanders v. Russell, 21 Am. St. Rep. 30; Blue v. Blue, 87 Am. Dec. 275-281. However, it is held in Macke v. Byrd, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448, that a judgment reaches the excess only after an ascertainment and setting out of the part to which the exemption applies; and until such excess is defined and set apart, it cannot be subjected to execution.

RALEIGH v. FIRST JUDICIAL DISTRICT COURT.

[24 Mont. 306, 61 Pac. 991.]

RES JUDICATA—DEFECT IN WILL CONTEST.—The dismissal of a will contest because it fails to state any ground of opposition to the will does not deprive a party of the right to commence and maintain a subsequent contest based upon other grounds.

WILL CONTEST—WHEN MAY BE FILED—WHEN MAY BE INSTITUTED.—The statement of opposition to the probate of a will may be filed at any time prior to the hearing of proof of the will.

MANDAMUS.—REFUSAL TO TAKE JURISDICTION, or, after having acquired jurisdiction, refusal to proceed in its regular exercise, or the erroneous determination of a preliminary question of law, upon which the court refused to examine the merits, will be corrected by mandamus.

MANDAMUS—TO COMPEL COURT TO TAKE JURISDICTION OF WILL CONTEST.—If a court erroneously strikes from the files a contest of a will, on the ground that it was inadmissible because of a previous contest, which had been dismissed for a failure to state a ground of contest, a writ of mandamus will issue to compel such court to take jurisdiction of the contest, there being no appeal from the order striking the grounds of contest from the files, and the contestant having no adequate legal remedy.

T. J. Walsh, Sanders & Sanders, and Massena Bullard, for the plaintiff.

Clayberg & Gunn, H. G. McIntire, and H. S. Hepner, for the defendant.

307 **PIGOTT, J.** This is an application for a writ of mandate to the district court of Lewis and Clarke county, commanding it, among other things, in substance, to reinstate and entertain jurisdiction of a contest instituted by the plaintiff on the fifth day of May, 1900, of the alleged will of one Albert G. Clarke, deceased. An alternative writ was issued, and the court, through its judges, showed cause by answers. The petition and answers disclose these facts: On the tenth day of January, 1900, the Honorable Sidney H. McIntire, one of the judges of the district court of Lewis and Clarke county, appointed the twenty-third day of January, 1900, as the time for the hearing of a petition praying for the probate of the alleged will, and of two alleged codicils thereto (one bearing date the sixteenth day of January, 1899, and the other having been made on the twenty-seventh day of June of that year) of Clarke, deceased. On the day appointed for the hearing, the plaintiff in the present proceeding appeared and filed the state-

ment of her grounds of opposition to the probate of the purported will, in so far as the codicil of January 16, 1899, was concerned, alleging that such codicil was no ³⁰⁸ part of said will, the testator having been induced to make the codicil by the fraud and undue influence of certain devisees and legatees. The petitioners for the probate of the will traversed the averments of the contestant touching the fraud and undue influence, and also pleaded matter in avoidance. The contestant, by reply, joined issue on the new matter. On the second day of May, 1900, the contest came on for hearing before the court sitting with a jury, whereupon the proponents of the will objected to the introduction of evidence and to the court's proceeding further in the cause, and moved that the grounds of opposition be overruled, for the reason that the execution of the second codicil was a republication of the original will as modified by the codicil of January 16, 1899, and because the grounds of opposition were confined solely to the first codicil; there being no allegation that the testator was of unsound mind at the time of the execution of the last codicil, or that he was induced to make it by fraud, duress, or undue influence. Before the submission of the motion, the contestant offered to file and serve amended grounds of opposition, alleging that at the time of the making of each of the codicils, the decedent was not free from fraud or undue influence, but, on the contrary, that certain of the legatees and devisees had exercised, and did then exercise, over him, undue influence, and practiced fraud upon him, whereby he was induced to make the codicil dated January 16th, and also the later one of June 27th. The proponents objected to the allowance of the amended statement of grounds of opposition to the will, for the reason that the proposed amended protest set forth a new and different cause of action from that originally filed, which objection was sustained on the fourth day of May. On the same day the objection theretofore interposed to the reception of any evidence in support of the allegations of the contest and the motion to overrule the contest were, respectively, sustained and granted, and the contest was dismissed. The court then adjourned the hearing of the petition to prove the will to the fifth day of May, at the hour of 2 o'clock in the afternoon. On that day, and before the hour appointed, the contestant filed a ³⁰⁹ duly verified statement of her grounds of opposition to the probate of the will, the statement setting up the same objections that were contained in the amended statement of opposition offered

to be filed on the second day of May. At the hour of 2 o'clock on the fifth day of May the proponents of the will moved to strike from the files the statement of contest. On May 26th the court granted the motion, and refused to proceed further with the contest, the court basing its action upon the supposed fact that the contestant had, at the time originally appointed for the hearing of the petition to prove the will, filed her written opposition to the probate of the will, assailing the first codicil only. The court held that one contest had already been filed and disposed of upon law points, and that the statute will not permit successive contests before probate. After the court, through Judge McIntire, had stricken the grounds of opposition from the files, the matter of hearing proof of the execution of the alleged will and codicils was, upon motion of the contestant, transferred by Judge McIntire to the other department of the district court, presided over by the Honorable Henry C. Smith, as judge, with the request that Judge Smith act in the place of Judge McIntire in hearing the proof touching the execution of the will and codicils. Since the transfer to Judge Smith's department, no hearing has been asked for or had.

Upon the foregoing facts the defendant moves this court to quash the alternative writ of mandate and dismiss the proceeding, for the reason that neither the petition nor alternative writ states facts sufficient to authorize the granting of the peremptory mandamus, or any relief whatever. The plaintiff, on the other hand, moves the court to grant a peremptory writ of mandate herein, notwithstanding the answers.

Two questions are presented: 1. Did the plaintiff have the right to file written grounds of opposition to the probate of the will after the dismissal of the first contest, and subsequently to the day originally appointed for hearing the petition for the probate of the will, but at the time to which the hearing was postponed? 2. Is mandamus the proper remedy? ³¹⁰ These two questions only are necessarily involved. Whether or not the court erred in refusing to permit the plaintiff to amend her grounds of contest, and whether or not the court was right in dismissing the first formal contest, we need not inquire. Nor is it essential that we consider the scope or effect of that part of section 2 of article 8 of the constitution of Montana providing that the supreme court "shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law." This provision was

touched upon in *State v. Second Judicial District Court*, 22 Mont. 220, 56 Pac. 219, and provisions resembling it have been considered in *Vine v. Jones*, 13 S. Dak. 54, 82 N. W. 82; *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081; *State v. Judge*, 31 La. Ann. 794; *Tawas etc. R. R. Co. v. Judge*, 44 Mich. 479, 7 N. W. 65; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622. With regard to the doctrines announced in these cases which we have cited for convenient reference, no opinion is expressed.

1. The court held that the first contest failed to state any ground of opposition to the will, and therefore dismissed it. Before the hearing of the petition, the plaintiff caused to be filed the statement of the new grounds of opposition to the will; this the court refused to consider, and struck from the files, for the reason that the plaintiff had already attempted to maintain a contest which had been disposed of upon law points, the statute not permitting successive contests before probate. It is to be observed that the first attempted contest was dismissed because it failed utterly to state any ground of opposition to the probate of the will, and that the second contest was dismissed because there had already been a contest instituted against the will. Without commenting upon this seeming inconsistency, it is enough to say that the institution and dismissal of the first intended contest did not deprive the plaintiff of the right to commence and maintain a subsequent contest based upon other grounds. Neither the common law nor ^{§ 11} the statute recognizes the doctrine applied by the court in striking from the files the second statement of contest. In this court counsel for the defendant argue that, because the plaintiff failed to institute the second contest at the time originally appointed for the hearing of the petition for probate, the court was correct in striking it from the files. Their contention is that one desiring to contest a will before probate must, at the time appointed for the hearing, file his statement of the grounds of opposition, and that a contest instituted thereafter, even though it be at the time to which the hearing was postponed, is too late. In our opinion, such is not the interpretation of those sections of articles 1 and 2 of chapter 2, title 12, part 3 (sections 2320-2346), of the Code of Civil Procedure, pointing out the procedure with respect to the probate and contest of wills. We are satisfied that the statement of opposition to the probate of the will may properly be filed at any time prior to the hearing of proof of the will. The interpretation contended for by counsel cannot be indulged with-

out giving to the statutes a meaning of which their language is not fairly susceptible.

2. Is mandamus the proper remedy? The plaintiff possessed the absolute right to institute the second contest. The district court struck the contest from the files for the reason that, as the court believed, the law did not permit it to be filed. But the law specially enjoined upon the district court the duty to entertain jurisdiction and proceed in the regular exercise thereof, and to refrain from striking a contest for the reason assigned. Refusal to take jurisdiction, or, after having acquired jurisdiction, refusal to proceed in its regular exercise, or the erroneous determination of a preliminary question of law, upon which the court refused to examine the merits, will be corrected by mandamus. The rule that mandamus will not issue to control discretion or to revise judicial action, but only to direct the court to act in such matter, is to be understood as applying only to the act to be commanded by the writ, and not to the decision of purely preliminary questions of law only. If the rule applied to such preliminary questions then, ³¹² to use the language of Mr. Hayne in section 323 of his treatise on New Trial and Appeal, "no writ of mandamus could ever issue, and the machinery provided by the code for trying such questions would be useless. The distinction above stated applies not only where the act to be performed is purely ministerial—such as the signature of a warrant, the payment of a claim, or the like—but also where it is judicial in its nature." In *Castello v. Circuit Court*, 28 Mo. 259, it was held that "where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary objection, and that objection is purely a matter of law, a mandamus will go, if the inferior court has misconstrued the law." Judge Scott, in concurring, expressed the opinion that if the inferior court had quashed the proceeding upon an erroneous interpretation of the statute requiring a notice to be given, mandamus would not lie, but that if notice was not required by any law or rule of practice, then that the inferior court had no authority to exact the giving of such notice, and mandamus would lie. In the present proceeding there was no law or rule of practice which prevented the institution of the second contest at any time prior to the hearing of the petition for the probate of the will—possibly the right may continue until the admission to probate. If the statute or the law required that a contest be commenced at or prior to the time originally appointed for the hearing of the

petition, or prescribed that not more than one contest should be instituted by the same person, and the court, upon applying the facts to the statute or law, had erroneously decided against the plaintiff, holding that the contest of the plaintiff was within the inhibition of such statute or law, then, perhaps, the judgment or discretion of the lower court could not be controlled by mandamus. Mr. High, in section 151 of his work on Extraordinary Legal Remedies, says: "A distinction is recognized between cases where it is sought by mandamus to control the decision of an inferior court upon the merits of a cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or of practice preliminary to the final hearing. And ³¹² while, as we shall see, the decision of such court upon the merits of the controversy will not be controlled by mandamus, yet if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case, mandamus will lie to compel it to proceed."

Although the writ of mandate will not lie to correct errors committed by a court while exercising its judicial discretion upon the merits of the case (either of law or of fact) within its jurisdiction, as was held in *State v. Smith*, 23 Mont. 329, 58 Pac. 857, yet, to adopt the language of the supreme court of the United States in *Ex parte Parker*, 120 U. S. 737, 7 Sup. Ct. Rep. 767, which case has been cited with approval in *State v. Eddy*, 10 Mont. 311, 25 Pac. 1032, the writ of mandate does "properly lie in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof." In the *Parker* case the supreme court of the territory of Washington refused to hear a case taken to that court by appeal, because it considered, upon an erroneous interpretation of the statute, that the parties were not in court for the purposes of appeal, and the court dismissed the appeal for want of jurisdiction. The supreme court of the United States issued a peremptory mandamus commanding the territorial court to reinstate the appeal, and proceed, in the exercise of its jurisdiction, to hear and determine the same upon its merits. *Ex parte Schollenberger*, 96 U. S. 369, *Harrington v. Holler*, 111 U. S. 796, 4 Sup. Ct. Rep. 697, *In re Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708, *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. Rep. 611, and *In re Hohorst*, 150 U.

S. 653, 14 Sup. Ct. Rep. 221, in which writs of mandate were issued, are well-considered cases upon this subject. The doctrine announced by the supreme court of the United States, and the principles deduced by the text-writers mentioned from a consideration of ³¹⁴ the cases, are well-nigh universally recognized and followed by the English and American courts, as will appear by an examination of the following citations: *Castello v. Circuit Court*, 28 Mo. 259; *State v. Cape Girardeau Court of Common Pleas*, 73 Mo. 560; *State v. Laughlin*, 75 Mo. 358; *State v. Hunter*, 3 Wash. 92, 27 Pac. 1076; *Ferguson v. Kays*, 21 N. J. L. 431; *People v. New York Common Pleas*, 18 Wend. 534; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *Floral Springs Water Co. v. Rives*, 14 Nev. 431; *State v. Murphy*, 19 Nev. 89, 6 Pac. 840. Nor is this court without the authority of its own adjudications which either expressly or tacitly recognize the doctrines and principles referred to: *State v. Eddy*, 13 Mont. 311, 25 Pac. 1032; *State v. District Court of First Judicial District*, 13 Mont. 370, 34 Pac. 298; *State v. District Court of Third Judicial District*, 14 Mont. 476, 37 Pac. 7.

It is, therefore, unnecessary now to determine whether, in striking from the files the statement of the grounds of opposition to the will, the district court refused to take jurisdiction of the second contest, or, after having obtained jurisdiction, refused to proceed in its exercise, or (if this differs from a refusal to proceed in the exercise of jurisdiction) erroneously decided a pure question of law or practice presented as a preliminary objection, and upon such erroneous interpretation refused to entertain the contest. Manifestly, the court did the one thing or the other or both, and in either case mandamus is the proper remedy, unless there are other grounds for the denial of the writ.

The plaintiff is therefore entitled to a peremptory writ, unless she has a plain, speedy, and adequate remedy in the ordinary course of law. There is no appeal allowed from the order striking the grounds of contest from the files; but conceding that the error committed by the district court in striking the grounds of contest from the files might be reviewed in this court on an appeal from the judgment admitting the will to probate, yet such remedy would not be plain, speedy, ³¹⁵ and adequate. In the present state of the calendar of this court, and under the present rules, an appeal from a judgment admitting the will to probate could not be heard within two years

after the filing of the transcript, and before that time the right of the plaintiff, conferred by section 2360 of the Code of Civil Procedure, to contest after the probate would have expired. In *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. Rep. 221, the court said: "The Hamburg-American Packet Company being liable to this suit in the circuit court of the United States for the southern district of New York if duly served with process in the district, and having been so served, and the order of that court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the circuit court to take jurisdiction of the suit as against the corporation." In *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. Rep. 611, the court said: "In the present case, as we have before observed, there was no discretion to be exercised by the circuit court; and although it might have been admissible to raise the question by a new appeal to the proper court, yet, in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper." To the same effect is *State v. Murphy*, 19 Nev. 89, 6 Pac. 840.

Much stress has been laid upon the case of *State v. Smith*, 23 Mont. 329, 58 Pac. 857. Counsel for the defendant assert that it is decisive of the proceeding at bar. That case, however, is not in point. There the district court did not refuse to entertain the action, but took jurisdiction of it, and if the court erred, the error was not committed in the decision of a question of law preliminary to any investigation, but in a matter in relation to an interlocutory order involving discretion, which could not be controlled by a writ of mandate. There it was also properly held that an appeal from a judgment against the plaintiff therein would furnish a plain, speedy, and adequate remedy in the ordinary course of law for the correction of any error committed in refusing to change the venue; an appeal was the only remedy in that case, and, ³¹⁶ in contemplation of law, it was in every respect ample.

A peremptory writ will be granted as prayed, commanding the district court to restore the second contest to the files, and to proceed therewith in the due exercise of its jurisdiction.

A JUDGMENT OF A PROBATE COURT rejecting a paper pronounced as a will is conclusive upon all claiming under it, and precludes a resort to the same or any other tribunal to set up the same paper while that sentence remains in force and unreversed:

Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335, and note. An executor cannot repropound a testament pronounced against when first offered by him otherwise than upon the ground of newly discovered evidence: Redmond v. Collins, 4 Dev. 430, 27 Am. Dec. 208.

MANDAMUS LIES TO COMPEL A JUDGE to hear a cause if he has erroneously refused to hear it on the ground that he is disqualified or has not jurisdiction: State v. Young, 31 Fla. 594, 34 Am. St. Rep. 41, 12 South. 673, and note. See a further discussion of this subject in the monographic note to Dane v. Derby, 89 Am. Dec. 739, 740.

MONROE v. CANNON.

[24 Mont. 316, 61 Pac. 863.]

TRESPASS OF CATTLE—LIABILITY FOR PASTURAGE.—From the facts that an owner of sheep herds and pastures them on the land of another for a stated period of time, and that such pasturage is worth a stated amount, the law creates an implied promise to pay for the pasturage, although the sheep were wrongfully on the land.

TRESPASS ON UNINCLOSED LAND.—AT COMMON LAW every man's land was deemed to be inclosed, either by a visible or invisible fence, and every unwarrantable entry on such land necessarily carried with it some damage for which the trespasser was liable.

TRESPASS OF CATTLE.—AT COMMON LAW a man is answerable not only for his own trespass, but for that of his cattle also.

TRESPASS OF CATTLE—UNINCLOSED LAND.—UNDER A STATUTE providing that the owner of domestic animals which trespass upon land inclosed by a legal fence is liable for all damages caused thereby, he is not liable for a trespass committed by his cattle upon uninclosed land when they are lawfully running at large.

TRESPASS—HERDING OF SHEEP ON UNINCLOSED LAND.—An owner of sheep who herds and pastures them on the uninclosed land of another is liable in assumpsit for the value of the grass destroyed by the sheep, notwithstanding a statute which provides that the owner of an animal which breaks into a legally fenced inclosure shall be liable for the resulting damage, since such statute does not apply to a case where one knowingly and willfully herds his cattle on the uninclosed land of another.

Assumpsit to recover six hundred dollars for pasturage. Defendant inclosed a large tract of land by a fence which included one hundred and twenty acres of land, to which the plaintiff had title. Plaintiff irrigated his land and planted grass, and defendant herded and pastured two thousand three hundred sheep upon the plaintiff's land without his consent and against his protest, and the grass was eaten up. Judgment for plaintiff for three hundred dollars.

Massena Bullard, for the appellant.

F. E. Stranahan, for the respondent.

³¹⁹ WORD, J. Appellant concedes the respondent's ownership of the land, the appellant's ownership of the sheep, and the value of the ³²⁰ pasturage. That respondent's land was unfenced is undisputed.

To appellant's objection that the complaint is insufficient, it is enough to say that the complaint contains all the averments necessary to the creation of a legal liability on the part of the appellant. It alleges ownership of the land in the respondent; ownership of the sheep in the appellant; the fact that they were herded and pastured on respondent's land during a stated period of time; and that such pasturage was worth the amount stated in the complaint. From these facts, if proved, the law creates an implied promise, and a legal liability, although the appellant's cattle were wrongfully on the respondent's land: *De La Guerra v. Newhall*, 55 Cal. 21; *Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 380.

The main contention of appellant is that no action lies, and no damages can be recovered, for trespass by animals on unclosed lands; and in support of his position appellant cites the cases of *Smith v. Williams*, 2 Mont. 195, *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120, and many others of like tenor from other states. It is to be observed that most, if not all, of the decisions to which appellant directs our attention rest upon statutory provisions the same as, or similar to, section 3258 of the Political Code, which is as follows: "If any cattle, horse, mule, ass, hog, sheep, or other domestic animal break into any inclosure, the fence being legal, as hereinbefore provided, the owner of such animal is liable for all damages to the owner or occupant of the inclosure which may be sustained thereby. This section must not be construed so as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law."

The question now arises, To what extent have statutes like the one just cited limited the right of an owner, or of one in possession, of real property, to recover for trespasses committed upon it? "Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close, the words of the writ of trespass commanding the defendant to show cause, 'Quare clausum querentis fregit.' For every man's ³²¹ land is, in the eye of the law, inclosed and set apart from his neigh-

bors'; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage": 3 Blackstone's Commentaries, 209.

"A man is answerable for not only his own trespass, but that of his cattle also; for if, by his negligent keeping, they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages": 3 Blackstone's Commentaries, 211, 212.

While admitting that such would be the rights of respondent under the common law, appellant contends that the provisions of section 3258 of the Political Code, which makes the owner of any animal named therein liable for all damage such animal may do by breaking into an inclosure surrounded by a legal fence, negative the right to sue for damages, where the premises are not inclosed by a legal fence; and that, in order to maintain an action, it is necessary to allege and prove that the premises upon which the trespass was committed were inclosed by a lawful fence.

If, in the case now under consideration, the damage sustained by respondent had resulted from trespasses committed by cattle or sheep, or other animals named in the statute, lawfully at large and not under the direction or control of their owner, then appellant's position would be sound. But the evidence in this case presents a different question. Under the conditions disclosed by the record, what rights had respondent? If appellant is right, the respondent, although his grass had been destroyed by the deliberate act of appellant, was without remedy; silent acquiescence was all that was left to him. If appellant is correct, ³²² no man whose field, or pasture, or garden is not inclosed by a legal fence is entitled to any protection under the law from the trespasses of any man who may desire to drive or herd his cattle or sheep upon it. If this is true in this case, it is true in any case where a man's land is not protected by a legal fence. Take the case of a field in cultivation, or of a garden adjacent to a home. It may be that the fence

around each had for years served to keep all animals out, and yet was not as high or as strong as the law required. Can it be possible that any man is at liberty to tear down such a fence, drive his sheep or cattle within, that they may feed upon the contents, and escape all liability on the ground that no man has any right to complain of such injuries whose premises are not protected by a legal fence? Such, in our opinion, is not the law. And we are of opinion that under the evidence in this case the respondent's right to recover for the damage sustained by him is as clear as would be that of one whose fence had been torn down by another, and the fruits of his labor destroyed. If a man has the right to drive his sheep or cattle upon the uninclosed land of another, and to pasture them there, against the will and wishes of the owner, it follows that he would have the right to go upon the same land, to mow the grass growing thereon, and appropriate it to his own use. The mistake appellant makes is in concluding that the statute providing for and defining a lawful fence, and giving damages for the trespass of certain animals upon premises inclosed by such a fence, does not modify, but abrogates the rights existing under the common law.

Such was the contention in the case of *Harrison v. Adamson*, 76 Iowa, 338, 41 N. W. 34. In the opinion the court observed: "The allegations of the petition are to the effect that the defendant knowingly and willfully caused his cattle to be driven and kept upon plaintiff's land. Surely, the owner of uninclosed prairie land is not deprived of his rights in it by any statute of the state in regard to fences, or which authorizes another to use it for pasturage against the owner's will. If he may so use it, why may he not use it for cultivation? 323 There is nothing to be found in the statutes of this state or the decisions of this court depriving the owner of uninclosed land of the profits of the grass and pasture thereon, and exempting one who, against his consent, appropriates the grass or pasture, from liability therefor to the owner. The laws of the state provide that trespass is not committed when cattle which are running at large enter upon uninclosed land. But it is quite a different thing when cattle not running at large, but in the charge and under the control of a herdsman, the employé and agent of their owner, are driven and kept upon uninclosed land against the will of the land owner, and with full knowledge of the owner of the cattle. In that case the

trespasser takes and appropriates the use of the land for pasture, and is held by the law liable therefor. In the other case, where the cattle, being at large without the act or knowledge of the owner, go upon the land, the owner is not liable, for the reason that he committed no trespass, and has not knowingly appropriated the use of the land."

A like contention as to the necessity of a fence, in order to give a right of action was made in the case of *Powers v. Kindt*, 13 Kan. 74, an action of trespass to recover for injuries committed by defendant's cattle to growing crops of plaintiff. The court, in an opinion by Brewer, J., say: "It is insisted that, because the findings show that Kindt had no legal fence or inclosure around his premises, he was not entitled to recover. But the court also finds that Powers' cattle were driven and herded upon the premises of Kindt against his wishes and consent, and while so driven and herded destroyed the property as alleged; and as a conclusion of law from the various facts found, that Powers was guilty of a wanton and willful want of care. This brings the case within the rule laid down in *Larkin v. Taylor*, 5 Kan. 433, 446. It is claimed that because the plaintiffs in error employed herders to watch their cattle, and keep them off from other parties' crops and premises, they could not be held liable where they would not have been held liable if they had simply turned them loose, and they had roamed upon Kindt's premises and done the damage ³²⁴ complained of. This ignores the fact that the court finds that these cattle were driven and herded upon Kindt's premises, which brings in the element of gross negligence or wanton and willful want of care."

The case of *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477, an appeal from the circuit court for the northern district of Texas, was much like the one now under consideration. The defendant in that action (as did the defendant in this) requested the court to charge that "the law is that the owner of stock is not required to keep them in an inclosure, or to prevent them from ranging on the land of others; and that the owner of land trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass, unless his land is fenced," and further, "that to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common inclosure around the lands of plaintiff

and those leased by defendant, and no fence separating such lands, then the plaintiff cannot recover." The court in its opinion in the case said: "The object of the statute [requiring the fencing of lands] is manifest. As there are, or were, in the state of Texas, as well as in the newer states of the west generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their lands, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands and depasture their cattle upon them, without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, ³²⁶ was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his lands for pasturage should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land, adjoining an uninclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such case," citing the following cases: *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 390, 20 S. W. 855; *Kerwhacker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 177; *Larkin v. Taylor*, 5 Kan. 433; *Delaney v. Errickson*, 11 Neb. 533, 10 N. W. 451; *Otis v. Morgan*, 61 Iowa, 712, 17 N. W. 104; *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690; to which may be added *Erbes v. Wehmeyer*, 69 Iowa, 85, 28 N.

W. 447; *Bedden v. Clark*, 76 Ill. 338; *Norton v. Young*, 6 Colo. App. 187, 40 Pac. 156.

A number of the cases cited by appellant refer to the distinction pointed out in *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477, and recognize the rule there laid down: See *Nuckolls v. Gant*, 12 Colo. 361, 21 Pac. 41; *Walker v. Bloomingcamp*, 34 Or. 391, 43 Pac. 175, 56 Pac. 809; *Chase v. Chase*, 15 Nev. 259, 263; *Larkin v. Taylor*, 5 Kan. 434; *Bileu v. Paisley*, 18 Or. 47, 21 Pac. 934.

The case of *Smith v. Williams*, 2 Mont. 195, is not at variance with the views herein expressed. That was an action in the nature of trespass to recover damages alleged to have been suffered by reason of the cattle of defendant breaking into the inclosure of plaintiff and destroying his grain. The evidence in the case was not properly before the court, and ³²⁶ was not considered. Upon the theory that the cattle were lawfully at large, and were not driven or herded upon the premises of plaintiff by defendant, the ruling of the court in this case can be upheld.

The case of *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120, seems to conflict with the views of the court in the present case. We find, however, that the court in that case used the following language: "Section 1119 of the fifth division of the Compiled Statutes subjects the owners of animals to liabilities for any damage done by them by breaking into the lands of another inclosed by a lawful fence. This section negatives the liability of the owner when animals lawfully at large, as in this instance, stray on uninclosed lands in quest of food or pasturage." If the facts in the case were as indicated in that part of the opinion just given, then *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120, is in accord with the conclusions reached herein.

In the case before us, the complaint was amended so as to charge that the defendant "willfully and maliciously" herded and pastured his sheep upon plaintiff's land. While there was enough evidence of willfulness and malice on the part of the defendant to go to the jury, yet exemplary damages were not asked, and it is admitted that a verdict for the actual damages only was returned. We may say, further, that the action being in contract, the tort having been waived, the original complaint was sufficient, and the amendment made thereto unnecessary.

The judgment and order appealed from are accordingly affirmed.

Liability of Owners of Stock Herded or Permitted to Range on the Lands of Another, Though They are not Protected by a Lawful or any Fence.*

Common-law Rule as to Trespassing Animals.—At common law every man was bound, at his peril, to confine his cattle to his own land, and if he failed to do so he was liable for any trespass they committed on the lands of another: *Lafayette etc. R. R. Co. v. Schriener*, 6 Ind. 141; *Page v. Hollingsworth*, 7 Ind. 317; *Brady v. Bell*, 14 Ind. 317; *Michigan etc. R. R. Co. v. Fisher*, 27 Ind. 96; *Indianapolis etc. R. R. Co. v. Harter*, 38 Ind. 557; *Wells v. Beal*, 9 Kan. 597; *Little v. Lathrop*, 5 Me. 350; *Richardson v. Milburn*, 11 Md. 340; *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262; *Gregg v. Gregg*, 55 Pa. St. 227; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755; *Bulpit v. Matthews*, 145 Ill. 845, 34 N. E. 525. The cattle owner was generally liable for every trespass committed by his animals: *Eames v. Salem etc. R. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Baltimore etc. Ry. Co. v. Lamborn*, 12 Md. 257; *Noyes v. Colby*, 30 N. H. 143; *Rossell v. Cotton*, 31 Pa. St. 525. And it is immaterial whether the land trespassed upon is inclosed by a defective fence or no fence at all: *Stewart v. Benninger*, 138 Pa. St. 437, 21 Atl. 159; *Harrison v. Brown*, 5 Wis. 27; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Wells v. Howell*, 19 Johns. 385. Indeed, the question of fencing is unimportant so far as the land owner is concerned, since it is the cattle owner's duty to keep his animals confined and prevent them from trespassing on the lands of another. The question of inclosing lands is, therefore, seldom found to be treated in the discussion of the common-law doctrine: *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246. A land owner is under no obligation to fence his lands, even along the highway: *Chambers v. Matthews*, 18 N. J. L. 368; *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246. And while it seems that a cattle owner, who is lawfully driving his cattle along the highway, is not subject to liability for an unavoidable and accidental trespass upon uninclosed lands bordering thereon: *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Chambers v. Matthews*, 18 N. J. L. 368; yet the right to drive cattle over the highway gave no right to pasture such cattle, even in the highway, since by so doing the owner of the cattle was infringing upon the rights of the owner of the soil and freehold. Cattle have only the right of passage upon the highway; and if they are there for any other purpose they are trespassing: *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.

At common law, therefore, every entry of a man's cattle on the land of another constituted an actionable trespass, whether the land

*REFERENCES TO MONOGRAPHIC NOTES.

Liability for trespasses of animals generally: 49 Am. Dec. 248-273.
 Estray laws in the United States: 8 Am. St. Rep. 271-273.

was inclosed or uninclosed. And even the pasturing of cattle in the highway, over which the cattle had the right of passage, was a trespass for which the owner was liable, if the fee to such highway was in the adjoining land owner. Hence, the question whether an owner of cattle is liable for herding them on the uninclosed land of another is of no practical importance where the common-law rule prevails, since there cannot be the slightest doubt respecting such liability.

Rule that Stock Must be Fenced Out.—The question of liability for herding stock on another's land becomes important only where the common-law rule already noticed has been altered or changed, and where cattle owners are, either by statute, custom, or prescription, not required to confine their cattle, but may permit them to range at large over uninclosed lands. In most of the states of the south and west the common-law rule requiring the owners of stock to inclose them on their own land is not applicable to the conditions of the country, nor in accordance with the customs of the people. Hence, in these states the rule prevails that cattle must be fenced out instead of fenced in, and a stock owner is not liable merely because he permits his cattle to range over uninclosed land other than his own: *Little Rock etc. R. R. Co. v. Finley*, 37 Ark. 562; *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561; *Kerwhacker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Wagner v. Bissell*, 3 Iowa, 396; *McPheeters v. Hannibal etc. R. R. Co.*, 45 Mo. 22; *Campbell v. Bridwell*, 5 Or. 311; *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Gorman v. Pacific R. R.*, 26 Mo. 441, 72 Am. Dec. 220; *Hannibal etc. R. R. Co. v. Kenney*, 41 Mo. 271; *Laws v. North Carolina R. R. Co.*, 52 N. C. 468; *Cleveland etc. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Murray v. South Carolina R. R. Co.*, 10 Rich. 227, 70 Am. Dec. 219; *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305; *Savannah etc. Ry. Co. v. Gelger*, 21 Fla. 660, 58 Am. Rep. 697; *Mobile etc. R. R. Co. v. Williams*, 53 Ala. 595; *Sprague v. Fremont etc. R. R. Co.*, 6 Dak. 86, 50 N. W. 617; *Clarendon etc. Co. v. McClelland Bros.*, 89 Tex. 483, 59 Am. St. Rep. 70, 34 S. W. 98, 35 S. W. 474; *Woodward v. Griffith*, 2 Tex. App. Civ., sec. 360.

It seems, however, that a land owner is required to fence only against cattle which are lawfully at large and on adjoining ground. Hence, if for any reason cattle are unlawfully on adjoining ground and from such ground trespass upon the lands of another, it is no defense to show that such lands were not protected by a sufficient fence: *Lyman v. Glipson*, 18 Pick. 422; *Herold v. Myers*, 20 Iowa, 378. This is the common-law rule as well: *Lawrence v. Combs*, 37 N. H. 331, 72 Am. Dec. 332; *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586.

Cattle Ranging Over Uninclosed Land.—In those jurisdictions where the owners of stock are not required to fence them in, it necessarily follows that stock may range at will over uninclosed lands. It does

not constitute a trespass for cattle to run at large on such lands: *Russell v. Hanley*, 20 Iowa, 219, 89 Am. Dec. 535; *Nashville etc. R. R. Co. v. Peacock*, 25 Ala. 229; *Macon etc. R. R. Co. v. Lester*, 30 Ga. 911; *Cincinnati etc. R. R. Co. v. Waterson*, 4 Ohio St. 425; *Kaes v. Missouri Pac. Ry. Co.*, 6 Mo. App. 397; *Mobile etc. R. R. Co. v. Williams*, 53 Ala. 595; *Delany v. Errickson*, 10 Neb. 492, 35 Am. Rep. 487, 6 N. W. 600. And the owners of cattle may allow them to thus range at will without being guilty of negligence or incurring liability: *Morris v. Fraker*, 5 Colo. 425; *Georgia R. R. etc. Co. v. Neely*, 56 Ga. 540; *Seeley v. Peters*, 10 Ill. 130; *Illinois Cent. R. R. Co. v. Arnold*, 47 Ill. 173; *Davis v. Hannibal etc. Ry. Co.*, 19 Mo. App. 425; *Alger v. Mississippi etc. R. R. Co.*, 10 Iowa, 268; *Kuhn v. Chicago etc. Ry. Co.*, 42 Iowa, 420; *Haughey v. Hart*, 62 Iowa, 96, 49 Am. Rep. 138, 17 N. W. 189; *Blaine v. Chesapeake etc. R. R.*, 9 W. Va. 252; *Baylor v. Baltimore etc. R. R.*, 9 W. Va. 270; *Hurd v. Lacy*, 93 Ala. 427, 30 Am. St. Rep. 61, 9 South. 378. Uninclosed lands are considered as quasi common, or a "range" upon which the owners of cattle may permit them to go at large: *New Orleans etc. R. R. Co. v. Field*, 46 Miss. 573. And it seems to be a matter of indifference whether the lands are cultivated or uncultivated. If, in fact, such lands are unprotected by a sufficient or any fence, a cattle owner is not liable for injuries done to crops by his stock running at large: *Gregg v. Gregg*, 55 Pa. St. 227; *Morris v. Fraker*, 5 Colo. 425; *Chase v. Chase*, 15 Nev. 259; *Larkin v. Taylor*, 5 Kan. 260; *Jones v. Witherspoon*, 7 Jones, 555, 78 Am. Dec. 263; unless by statute such owner is made liable for a trespass committed by his cattle upon improved land, as is the case in Iowa: *Little v. McGuire*, 38 Iowa, 560; *Hallock v. Hughes*, 42 Iowa, 516.

The rule is so firmly established, under the fence laws of the various states, that a cattle owner is not liable for injury done by his cattle while ranging at large over lands other than his own, that no action is permitted by the land owner to recover for such injuries unless his land was inclosed by a legal fence: *Gorman v. Pacific R. R.*, 26 Mo. 441, 72 Am. Dec. 220; *Kerwhacker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Jones v. Witherspoon*, 7 Jones, 555, 78 Am. Dec. 263; *Chase v. Chase*, 15 Nev. 259; *Gregg v. Gregg*, 55 Pa. St. 227; *Darling v. Rodgers*, 7 Kan. 592; *Wagner v. Bissell*, 3 Iowa, 396; *Heath v. Coltenback*, 5 Iowa, 490; *Herold v. Meyers*, 20 Iowa, 378; *Frazier v. Nortinus*, 34 Iowa, 82; *Seeley v. Peters*, 10 Ill. 130; *Misner v. Lighthall*, 13 Ill. 609; *Headen v. Rust*, 39 Ill. 186; *Illinois Cent. R. R. Co. v. Arnold*, 47 Ill. 173; *Williams v. Michigan Cent. R. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59; *Wright v. Wright*, 21 Conn. 320; *Morris v. Fraker*, 5 Colo. 425; *Nuckolls v. Gant*, 12 Colo. 361, 21 Pac. 41; *Comerford v. Dupuy*, 17 Cal. 308. In some of the cases it is said that the existence of a lawful fence is a condition precedent to the right of a land owner to bring an action for damages: *Smith v. Williams*, 2 Mont. 195. And this is

undoubtedly true where the cattle are simply permitted to range at will over uninclosed lands.

Herding Cattle on Uninclosed Land.—The willful herding of cattle on the uninclosed land of another without the consent of such land owner and against his protest raises a distinctly different question, and one which was correctly considered in the principal case. As was pointed out in *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, although an owner of cattle is not liable for the ranging of his cattle over his neighbor's uninclosed woodland, yet it does not follow that because such browsing is excusable as a trespass, it is a matter of right. "It is an immunity, not a privilege; or, at most, a license revocable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure." Perhaps some of the western states have more fully recognized the cattle owner's right as a privilege; yet they do not question the land owner's power to put an end to willful and intentional herding on his uninclosed land if he desires. In *Sabine etc. Ry. Co. v. Johnson*, 65 Tex. 389, while it is fully recognized that a cattle owner commits no actionable wrong in allowing his cattle to graze on uninclosed land, yet the court as strongly asserts the doctrine that in so doing the cattle owner asserts no right in the land and acquires none. And in *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 20 S. W. 855, it was said that the doctrine that the owner of cattle may allow them to roam over and graze upon uninclosed land at will "does not authorize the owner of cattle, by affirmative conduct on his part, to appropriate the use of such lands to his own benefit. He will not be permitted thus to ignore the truth that everyone is entitled to the exclusive enjoyment of his own property." In this case it is true that the cattle owner had inclosed the plaintiff's land along with land of his own, and in this way confined the grazing of his cattle to such land. But the cases recognize that a cattle owner is equally liable where he willfully herds his stock on another's land against his wish and consent, though they are not confined on such land by a fence: See *Powers v. Kindt*, 13 Kan. 74; *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477; *Polindexter v. May*, 98 Va. 143, 34 S. E. 971; *Delaney v. Errickson*, 11 Neb. 533, 10 N. W. 451.

The trespass permitted by the rule allowing cattle to roam at large is an accidental trespass caused by wandering cattle: *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477. Even those cases which lay down the rule that the existence of a lawful fence is a condition precedent to a right of action by a land owner for trespass by another's cattle confine such doctrine to the case of accidental trespass by roaming stock, and engraft an exception upon such rule where the stock owner willfully drives his stock upon the land for the purpose of confining it there: *Misner v. Lighthall*, 13 Ill. 609. In *Davis v. Davis*, 70 Tex. 123, 7 S. W. 826, where the stock owner had been a willful and persistent trespasser upon the plaintiff's land, the court held it to be immaterial that the fence which protected the

land was not a statutory fence, since the effect of the fence law was not to confer any absolute right to the use of another's land, and its purpose was not to throw open to the use of the public the lands of all proprietors who failed to observe the statutory requirements in making such inclosures. The willful and persistent use of the uninclosed or imperfectly inclosed land of another against his consent was in *St. Louis Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 20 S. W. 855, said to import necessarily the idea of liability. The rule is well stated by Justice Brown in *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477, in commenting on the fence law of Texas. "As there are, or were, in the state of Texas, as well as in the newer states of the west generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land, adjoining an uninclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such a case." This, we believe, is a correct statement of the law as it is generally recognized. While the owner of cattle may turn them out to wander of their own accord and graze upon lands which he knows belong to another: *Tarwater v. Hannibal etc. R. R. Co.*, 42 Mo. 193; and he is not required to restrain them from passing of their own accord upon any unfenced lands, yet he has no authority to drive them there and keep them herded upon such lands: *Polindexter v. May*, 98 Va. 143, 34 S. E. 971; *De-laney v. Errickson*, 11 Neb. 533, 10 N. W. 451; *Otis v. Morgan*, 61 Iowa, 712, 17 N. W. 104; *Harrison v. Adamson*, 76 Iowa, 337, 41 N.

W. 34. "The fence law," said the court in *Poindexter v. May*, 98 Va. 143, 34 S. E. 971, "has not repealed or in any way impaired the full force and effect of the common-law rule with respect to willful or malicious trespass." It is the willfulness of the act that furnishes the basis for holding the stock owner liable: *Powers v. Kindt*, 13 Kan. 74. And there is no law which requires a land owner to fence against the willful, injurious acts of others: *Delaney v. Erickson*, 11 Neb. 533, 10 N. W. 451. A trespass committed by cattle running at large is very different from a trespass committed by cattle which are in charge of a herdsman, who intentionally drives them and keeps them upon land against the will of the land owner. "In that case the trespasser takes and appropriates the use of the land for pasture, and is held by the law liable therefor. In the other case, where the cattle, being at large without the act or knowledge of the owner, go upon the land, the owner is not liable, for the reason that he committed no trespass, and has not knowingly appropriated the use of the land": *Harrison v. Adamson*, 76 Iowa, 337, 41 N. W. 34. To the same effect is *Otis v. Morgan*, 61 Iowa, 712, 17 N. W. 104. The fact that the stock is under the care of a herder is in no sense conclusive upon the question that the trespass is willful. Indeed, the general supervision of a herder, where the stock is permitted to roam at will over uninclosed land, does not alter the rule or render the stock owner any the more liable for trespasses committed, where the herder does not purposely drive the stock upon a particular piece of ground, or keep it there against the owner's consent for the purpose of pasturage. This question was passed upon in *Walker v. Bloomingcamp*, 34 Or. 391, 43 Pac. 175, 56 Pac. 809, and in *Fry v. Hubner*, 35 Or. 184, 57 Pac. 420, where it was held that sheep, which are required to be kept in the charge of a herder, in order to protect them from destruction, do not commit a trespass, for which their owner is liable, by ranging and feeding upon the common uninclosed lands, where they are not intentionally driven upon such land or willfully kept there for the purpose of pasturage. *Faint v. Lyman*, 9 Mont. 61, 22 Pac. 121, seems sustainable upon the same grounds. The Oregon cases just cited seem to go very far to deny a right of action to the land owner, in view of the fact that the complaint charged that the sheep were unlawfully, willfully, knowingly, and without the plaintiff's consent herded upon his land. Such terms were held to amount to nothing more than an averment that the defendants suffered their sheep in charge of a herder to graze upon the plaintiff's uninclosed lands, and that the term "herd" was not commensurate with purposely driving and intentionally retaining stock upon particular land.

Common Inclosure With no Division Fence.—Where the lands of several proprietors are inclosed in common but used in severalty, there being no division fences, the question might arise whether one of the owners who turned cattle upon his own land would be liable for

a trespass committed by such cattle while roaming over the other land in the inclosure. The statutes which we have noticed relative to the duty of a land owner to fence his lands to protect them against trespassing animals applies only to outside fences. In the absence of any additional statute or of any agreement between the parties, the common-law rule still regulates the rights of parties who have adjoining fields within a common inclosure. In such cases the land owner is not required to fence out his neighbor's cattle, but the cattle owner must confine his stock to his own land, and a failure to do so will subject him to liability: *O'Riley v. Diss*, 41 Mo. App. 184; *McKowan v. Harmon*, 56 Ill. App. 368; *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11; *Baker v. Robbins*, 9 Kan. 303; *Rust v. Low*, 6 Masa. 90; *Johnson v. Wing*, 3 Mich. 163. Hence, at common law, and even in those states where cattle may run at large, an owner of land in a common inclosure is rendered liable if he places cattle in the inclosure and they do damage on his neighbor's land. In those jurisdictions where cattle are allowed to run at large, however, it must be clear that the various parcels of land are within a real inclosure in order to compel one of such owners to confine his cattle when placed upon his own land within the inclosure. Thus, where the plaintiff and defendant owned adjoining tracts of land, and by the fences of other land owners the territory occupied by plaintiff and defendant became surrounded by fences, it seems that the defendant is not liable if cattle placed upon his own land wander upon the land of the plaintiff: *Pace v. Potter*, 85 Tex. 478, 22 S. W. 300. As is readily seen this is no real inclosure, and the common-law rule would not apply. But even in such a case there seems to be no reason why the defendant should not be held liable if he intentionally herds his stock upon his neighbor's land, and thus takes possession of such land and appropriates it to his use. This would seem to be clearly within the doctrine of the cases already considered. See, especially, *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. Rep. 477.

By statute the rights of owners of adjoining lands may be changed so as to deny a right to recover for damage done by trespassing cattle unless a lawful partition fence is maintained. In such case the owner of cattle would not be liable for the inadvertent trespassing of his cattle upon his neighbor's land: *Roach v. Lawrence*, 56 Wis. 478, 14 N. W. 595. And even where such a statute existed, it would seem that a cattle owner would be liable for a willful herding of his stock on his neighbor's land, though such a situation seems never to have arisen. Under most of the acts relating to partition fences, it seems that one land owner is not relieved from the duty of confining his stock to his own land until the division fence is actually provided for: *Keenan v. Cavanaugh*, 44 Vt. 268; *Selover v. Osgood*, 52 Ill. App. 200. After the establishment of the partition fence, a land owner injured by trespassing cattle can recover only by showing either that the stock passed through that por-

tion of the fence he was to maintain, and that it was good and sufficient, or that it passed through that part of the fence which it was the duty of the other land owner, and the cattle owner, to maintain, and that this duty was not performed: *Selover v. Osgood*, 52 Ill. App. 280.

STATE ex rel. HELENA WATER WORKS COMPANY v.
HELENA.

[24 Mont. 521, 63 Pac. 99.]

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT
—WATER SUPPLY.—A contract for a water supply entered into by a city which has already exceeded the constitutional limit of indebtedness, where a municipal ordinance appropriates out of the city's yearly revenues sufficient money to pay for the water, and orders the levying of annual taxes sufficient to meet the appropriation, is a contract within the prohibition of the constitution, where such prohibition is against becoming indebted "in any manner or for any purpose" when a given amount of indebtedness has been previously incurred.

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT
—LIABILITIES PAYABLE OUT OF CURRENT REVENUES.—A debt payable in the future or upon a contingency differs from a debt payable presently only in the manner by which it was incurred. Therefore, under a constitutional provision which prohibits a city from becoming indebted beyond a certain amount, "in any manner or for any purpose," there is no distinction between an indebtedness for current expenses, payable out of current revenues, and one for the payment of which no provision has been made, and for which the city is generally liable, both are within the constitutional prohibition.

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT
—SPECIAL TAX—WATER SUPPLY.—When a municipality has exceeded the constitutional limit of indebtedness, a contract for a water supply, under which the city is liable generally, is the incurring of an indebtedness within the meaning of the constitution, but such a contract does not create an indebtedness when the city is authorized by law to levy a special tax expressly for the payment of such contract liability, since in such case the liability is special, and limited to the amount of the tax levy expressly authorized.

MUNICIPAL INDEBTEDNESS—AGGREGATE OF ALL YEARLY PAYMENTS.—The contract of a municipal corporation for a useful and necessary thing, such as water, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual compensation has been earned.

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT
—LIABILITY OF CITY—APPROPRIATION TO PAY FOR WATER SUPPLY.—Under a contract for the supply of water, void because incurring an indebtedness in excess of the limit allowed by the constitution, any obligation flowing therefrom is void also,

and no liability to pay for water furnished under such contract is imposed upon the city by the fact that the city council has appropriated a particular sum to pay therefor.

MUNICIPAL INDEBTEDNESS — GENERAL — ACTION TO RECOVER — MANDAMUS.—Where the liability of a city under a contract is general, and there is no limit to the amount for which the city can become indebted, a failure on the part of the city to meet its obligations under the contract as they fall due will authorize the recovery of a general judgment against it, and mandamus will issue for the levy and collection of a tax to pay such judgment.

LAW — HARDSHIP IN SPECIAL CASES.—The settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.

MUNICIPAL INDEBTEDNESS—LIMIT — NOTICE OF — DUTY OF PRIVATE CONTRACTOR.—Where the powers of a city to incur indebtedness are limited, it is the duty of one who contracts with such city, whereby a debt is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness is in excess of the constitutional limitation.

Application for a writ of mandamus to compel the city of Helena to audit, allow, and pay certain claims for water furnished the city. The water was furnished under a municipal ordinance which appropriated out of the city's yearly revenues fifteen hundred dollars a month for the payment of the water, and authorized the city council to levy annual taxes sufficient to meet the appropriations made. The city levied taxes for general municipal and administrative purposes in 1898, 1899, and 1900, sufficient in amount to meet and discharge the appropriation made for water, together with the other expenses of the city. Each year the city council appropriated the sum necessary for the payment of the water furnished. The plaintiff's water plant and system was the only one in Helena in a position to furnish water to the city. The chief defense was that at the time the city entered into the contract the indebtedness of the city was largely in excess of the limit allowed by the constitution. Judgment was rendered for the defendant on the pleadings.

Clayberg & Gunn and H. G. McIntire, for the appellant.

Edward Horsky, for the respondents.

535 WORD, J. The first question we shall consider is, Did the city of Helena, by entering into the contract for a water supply, incur an "indebtedness," within the meaning of that term as it is used in section 6 of article 13 of the constitution of Montana?

Section 6 of article 13 of the constitution is as follows: "No city, town, township, or school district shall be allowed to be-

come indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township, or school district shall be void; provided, however, that the legislative ⁵²⁶ assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality, which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

It is admitted by the pleadings that at the time when the contract between James H. Mills, receiver, and the city of Helena was executed the city of Helena was indebted in a sum in excess of three per centum of the assessed valuation of the taxable property in said city, as ascertained by the last assessment prior thereto for state and county taxes.

In the court below counsel for defendants took the position that the city, thus indebted, by entering into said contract, created an indebtedness within the prohibition of the constitution. In support of this position, the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, among others, was cited. In view of the fact that the respondents claim that this decision is conclusive of the questions here presented, and inasmuch as the appellant seeks to show that this case has been overruled, or, at least, should not, in the light of the facts here presented, be held to control the decision upon this appeal, we will examine the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, and seek to determine if any of the questions therein decided are the same as those now presented.

The suit of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, was one for a perpetual injunction, brought against the mayor and aldermen of the city of Helena and George F. Woolston, to restrain them from carrying out a certain contract, alleged to be illegal, by laying water mains or erecting hydrants in the city, or by issuing any warrants for any water supplied to said city under said contract. Passing over those portions of the opinion given up to matters not now material, we come to a question like unto the one now before us. We quote as

follows: "But is such a contract as that proposed by the ⁵²⁷ ordinance in controversy actually forbidden by the charter of the city, as is contended by the respondents? Let us examine the charter, for the purpose of pointing out the precise section imposing the restriction. It is therein prescribed 'that said city shall not be authorized to incur any indebtedness on behalf of said city, for any purpose whatever, to exceed the sum of twenty thousand dollars': Sec. 17, as amended by the act of 1883; Charter, p. 19. The allegations of the complaint, which, for the purpose of this case, are for the present taken as true, show the present bonded indebtedness of the city to be nineteen thousand five hundred dollars, and the floating debt, consisting of outstanding warrants, to be fifteen thousand dollars. No distinction is drawn in the charter between bonded debt and floating debt, and from the figures presented it clearly appears that the limit has been already reached, and that the city cannot incur any further indebtedness until some of that outstanding has been discharged, or the limit enlarged by the legislature. Then if, by entering into the proposed contract, the city council would 'incur an indebtedness,' the same is plainly prohibited by the express terms of the charter." The court then goes on to interpret the term "indebtedness" as used in the city charter, and exhaustively reviews the decisions of Iowa, Illinois, and Indiana, wherein the meaning of constitutional provisions practically the same as those of section 6 of article 13 of the constitution of Montana is determined, and reaches the conclusion that the contract before the court involved a liability to pay money on a contingency morally sure to take place, irrespective of any action taken or option exercised by the city in the future, and so constituted an indebtedness such as was prohibited by the express terms of the charter. Among other cases cited from and commented on by the court in reaching this conclusion were Burlington Water Co. v. Woodward, 49 Iowa, 59, and Grant v. Davenport, 36 Iowa, 401. Counsel for appellant contend that these decisions were misinterpreted by the court in Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249, and so, when carefully considered, do not support the conclusion drawn therefrom. Let us see if this is so. The supreme ⁵²⁸ court of Iowa in Burlington Water Co. v. Woodward, 49 Iowa, 59, construing a constitutional provision almost identical with our own, says: "It is believed the constitution applies not only to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends

on some contingency before a liability is created. But it must appear that such contingency is sure to take place, irrespective of any action taken or option exercised by the city in the future; that is, if a present indebtedness is incurred or obligations assumed, which, without further action on the part of the city, have the effect to create an indebtedness at some future day, such are within the inhibition of the constitution. But if the fact of the indebtedness depends upon some act of the city, or upon its volition, to be exercised or determined at some future date, then no present indebtedness is incurred, and none will be until the period arrives, and the required act or option is exercised, and from that time only can it be said there exists an indebtedness." Commenting on the above, this court in *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, held that case analogous to the one then before it. Such, in our opinion, is true, in view of the conclusions reached; for it is to be noted that the Iowa decisions are in accord with the views expressed in *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, to this extent, at least, that a contract for a water supply entered into by a city which has already exceeded the constitutional limit of indebtedness, and which water supply such city is not able to pay for out of its current revenues, together with its other current expenses, is a contract within the prohibition of the constitution. The Iowa court, however, goes further, and holds "that when the contract made by the municipal corporation pertains to the ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provisions": *Grant v. Davenport*, 36 Iowa, 401. But this court in *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, refused to ⁵²⁹ adopt the construction of this constitutional prohibition against incurring indebtedness, though urged upon its attention by counsel, but, on the contrary, approved the construction given by the courts of Illinois and other states to a constitutional provision practically the same as our own.

It is said that in *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, it did not appear, as it does from the pleadings in the case at bar, that for each year since the making of the contract the city had levied and collected taxes in an amount sufficient to make the payments provided for in said contract; and to meet all the other liabilities and expenses of the city; but the authori-

ties cited and approved by the court passed upon a like contention, and held it to be against the plain meaning of the constitution, and so without merit. Thus, in *Springfield v. Edwards*, 84 Ill. 626, the court say: "Appellant contends that when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not 'debts,' within the meaning of the prohibition of the constitution, and that temporary loans are not, when within the limits of the revenue expected to be realized. The first branch of this position has support in *Grant v. Davenport*, 36 Iowa, 396; *People v. Pacheco*, 27 Cal. 175; *Koppikus v. Capitol Commrs.*, 16 Cal. 253; *State v. McCauley*, 15 Cal. 455; *State v. Medbery*, 7 Ohio St. 522; *State v. Mayor etc. of New Orleans*, 23 La. Ann. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered—thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. In considering what construction shall be given to a constitution or a statute, we are to resort to the natural signification of the words employed, in the order and grammatical arrangements in which they are placed; and if, when thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the instrument, then such ⁵³⁰ meaning is the only one we are at liberty to say was intended to be conveyed. There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under consideration, and to give them that meaning involves no absurdity or contradiction with other clauses of the constitution. The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay—"in any manner or for any purpose," when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking

contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute—the debt exists—and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred. And since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else.” And, as if these propositions did not cover the question, the court went further, and held it unlawful for a city indebted beyond the constitutional limit to incur a liability for current expenses or for anything else, even though it should at the same time make a formal appropriation, within the limits of its revenue, to meet it; that to avail itself of current, but uncollected, revenue for such purpose it must go further, and assign the amount out of a tax actually levied, and without recourse, in such a manner as to “leave upon the city no future obligation, either absolute or contingent, whereby its debt might be increased”: *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768.

⁵³¹ In *Law v. People*, 87 Ill. 385, the case of *Springfield v. Edwards*, 84 Ill. 626, is approved, the propositions above quoted therefrom are affirmed, and it is there declared that the inhibition of the constitution includes “indebtedness” of every kind and character, and in every sense of the term, no matter what the form by which it is evidenced may be, when contracted or issued after the statutory limit is reached.

In *Buchanan v. Litchfield*, 102 U. S. 278, and *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, the construction placed upon that section of the Illinois constitution before the court in *Springfield v. Edwards*, 84 Ill. 626, and *Law v. People*, 87 Ill. 385, is approved. In the latter case, Mr. Justice Miller, speaking for the court, says: “The language of the constitution is that no city, etc., ‘shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.’ It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as

effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." Such was the interpretation by the highest court in the land of this constitutional provision of the state of Illinois when our own constitution containing a like provision was adopted.

We have carefully examined those sections of our constitution wherein counsel for appellant claim an interpretation of the term "indebtedness," as used in the constitution, may be found. The sections cited are by their terms applicable to the state alone. By them the limit of state indebtedness is fixed, as is the limit of taxation as well. In the case of cities, ~~533~~ etc., the limit of indebtedness is fixed by the constitution, but the limit of taxation is fixed by the code, and so subject to change. Why cities, etc., were not included within the terms of section 2 of article 13, and section 12 of article 12, we need not pause to inquire, since we find as to them an express provision, the meaning of which is now before us for determination. Nothing is said in the constitution as to the manner in which a city shall meet its current expenses. The inhibition is against a city becoming indebted in any manner or for any purpose to an amount exceeding a certain per cent of its taxable property.

In view of these holdings, we can conceive of no possible ground for the supposed distinction between an indebtedness for current expenses, payable out of the current revenues, and one for the payment of which no provision has been made, and for which the city is generally liable: See, also, *Fuller v. Chicago*, 89 Ill. 282; *Fuller v. Heath*, 89 Ill. 296; *Howell v. Peoria*, 50 Ill. 104; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982; *Helena v. Mills*, 36 C. C. A. 1, 94 Fed. 916; *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 24 S. W. 872; *Spillman v. Parkersburg*, 35 W. Va. 606, 14 S. E. 279; *People v. May*, 9 Colo. 404, 12 Pac. 839; *Niles Waterworks v. Niles*, 59 Mich. 311, 26 N. W. 525; *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Jay v. School Dist.*, 24 Mont. 219, 61 Pac. 350.

Counsel for appellant next contend that even if this court is of opinion that the case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, supports the proposition that, by entering into the contract now before us, the city incurred an indebtedness such as is prohibited by the constitution, yet that case cannot be looked to as an authority, for the reason that it has been over-

ruled by the case of *State v. Great Falls*, 19 Mont. 518, 49 Pac. 15. We do not so read this last case. At the time the contract before the court in the *Great Falls* case was entered into there existed an act ⁵³³ of the legislature conferring upon cities the power to levy and collect a tax, not to exceed five mills on the dollar, for fire and water purposes. The court said: "This law was in force when Ordinance No. 17 was passed, approved, and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with rates prescribed in the ordinance contract, a special tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder, and the legislature in said act contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose. The case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, does not disapprove the Iowa cases holding that, because a general law provided for payment from a special fund, a liability incurred by a city to supply its inhabitants with water was not a 'debt,' in the sense of the term as employed in the constitution of Iowa, forbidding cities to incur debts in excess of a certain proportion of their assessable property. It was under different conditions of law and fact that the supreme court of the territory of Montana held in *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, that the liability incurred by the city of Helena under its ordinance contract was a debt. This appears from a careful reading of the case."

The case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, and the *Great Falls* case stand for two different and distinct principles. The first is an authority for the proposition that when a municipality has exceeded the constitutional limit of indebtedness a contract for a water supply, under which the city is liable generally, is the incurring of an indebtedness, within the meaning of the constitution, and the *Great Falls* case is an authority for the proposition that such a contract does not create an ⁵³⁴ indebtedness when the city making the contract is authorized by law to levy a special tax expressly for the payment of such contract liability. In a case falling within the first class, the

liability of the city is general, and is payable out of all its revenues; thus, in the case at bar, section 11 of the ordinance makes it the duty of the "city council during the term of five years to levy annual taxes under the provisions of the Political Code of the state of Montana authorizing the levy of taxes for general purposes, sufficient in amount to meet the appropriations hereby made," which, as appropriated by the same section, is the sum of fifteen hundred dollars per month for water furnished. In cases falling within the second class, the liability is special, and is limited to the amount of the special tax the levy of which is expressly authorized by law. So it may be said that the Great Falls case approves, rather than overrules, the case of *Davenport v. Kleinschmidt*, 13 Mont. 502, 13 Pac. 249: See *Helena v. Mills*, 94 Fed. 916. And it may be here noted that since the decision of the Great Falls case the special tax for fire and water purposes therein considered has been abrogated by the adoption of the codes, and the same conditions are now presented as existed at the time the case of *Davenport v. Kleinschmidt*, 13 Mont. 502, 13 Pac. 249, was decided: *Helena v. Mills*, 94 Fed. 916.

Counsel for appellant contend that the conclusions reached by this court in *Davenport v. Kleinschmidt*, 13 Mont. 502, 13 Pac. 249, are in conflict with the decision of the supreme court of the United States in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77. With this we cannot agree. In the first place it appears from a reading of the opinion in the Walla Walla case that at the time the bill in equity was filed and the preliminary injunction against the city was granted, the city of Walla Walla was not indebted to an amount in excess of the limit of indebtedness fixed in its charter. Commenting on limitations of this character, the court in the Walla Walla case say: "The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident ⁵³⁵ contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be

raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire-engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor. It is true that in the case of *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651, it was held by this court that a similar provision in the constitution of Colorado was an absolute limitation upon the power to contract any and all indebtedness, including warrants used for county expenses, such as for witness and jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc. But the case is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defense being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but as it appears that the limit of indebtedness was fifty thousand dollars, and the amount of the city debt but sixteen thousand dollars, it is clear that the payment of an annual rental of but fifteen hundred dollars would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness, a different question would be presented."

The Walla Walla case is an authority for the proposition 536 "that the contract of a municipal corporation for a useful and necessary thing, such as water or light, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual compensation has been earned, but that, if the amount agreed to be paid in any installment in compliance with such contract transcends the amount of permitted indebtedness, the city is not liable therefor": *Helena v. Mills*, 94 Fed. 916, and cases cited. With the city already indebted when the contract before us was made, in a sum largely in excess of the constitutional limit, how can it be said that the amount to be raised each year under the contract does not exceed the amount of indebtedness permitted by our constitution? A fortiori, is this true when the water rent and the other ex-

penses of the city for each year are taken together, as they must be, under our understanding of the constitution.

If, by entering into the contract before us, an indebtedness was not created, what was the purpose of section 11 of the ordinance wherein the city bound itself during the term of five years to levy annual taxes under the provisions of the Political Code authorizing the levying of taxes for general purposes to pay for water supplied under the contract? It may well be said that this obligation in itself implies the existence of a debt in favor of appellant and against the city.

It follows, from the view we have taken of the propositions before us, that the question asked in the beginning of this opinion must be answered in the affirmative.

2. The next question presented for our consideration is this, Does the amount now due and unpaid for water furnished to the city under the contract before us constitute an "indebtedness" within the meaning of the term as used in that section of the constitution above considered? This question is virtually answered by the conclusion we have already reached. Holding, as we do, that the contract itself is void, any obligation flowing from it is void also. This view accords with that portion of section 6 of article 13, *supra*, ⁵³⁷ wherein it is declared "that all bonds or obligations in excess of such amount (the limit of indebtedness) given by or on behalf of such city," etc., "shall be void." Nor can it make any difference, in our opinion, that the city council, in accordance with the provisions of section 4874 of the Political Code or otherwise, appropriated eighteen thousand dollars or other sum to pay for water furnished under said contract for a given year. The contract out of which these liabilities arose being void, it necessarily follows that no lawful authority to pay them exists. As we have indicated, the liability of the city under the contract before us, if any existed, would be general, not special, and were there no limit to the amount for which the city could become indebted, for a failure on the part of the city to meet its obligations for water rent as they fell due, the appellant could recover a general judgment against the city, and have a mandamus for the levy and collection of a tax to pay it.

Counsel for appellant say that the logical result of holding that the constitution prohibits a contract for current expenses which a city can meet out of its current revenues together with its other current expenses is that the city government must end—that the city cannot pay one dollar out of its treas-

ury for the necessities to sustain corporate life. Were it true that such dire results would flow from giving force to the plain terms of the constitution, it were better so than that this court should, by a loose construction of that instrument, endanger those sacred rights which by its terms are guaranteed to all the people: *Palmer v. Helena*, 19 Mont. 68, 47 Pac. 209. But that no such results need follow from the construction we give to this provision of our constitution is made plain by a consideration of the course pursued in those states where a like interpretation of a similar constitutional provision is adhered to. "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations, while so indebted, upon the cash or pay as you go plan, and not upon credit, to any extent or for any purpose": *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768. A way in which under such circumstances, the operations of a city may be carried on is pointed out in *Springfield v. Edwards*, 84 Ill. 626; and in commenting thereon in *Law v. People*, 87 Ill. 385, the court say: "The theory is that a corporation which has reached the constitutional limit of its power to create indebtedness may, when a tax is levied, but not collected, draw against the fund thus levied and provided, although not in the treasury, and thus appropriate and virtually assign the amount specified in the warrant on the treasury to the person to whom it is issued and delivered, and that amount, being assigned or set apart to him, when collected, he has the right to receive, and it becomes the duty of the officers to collect and pay it to him; and, failing in their duty, he would have an action against them for its recovery. But with a corporation thus situated the legal effect of the issuing and receiving of the warrant is that the person receiving an assignment or appropriation of so much of the specific tax already levied, and against which the warrant is drawn, by receiving it discharges the corporation from all liability on account of the services or articles for which it is drawn, and agrees to look to the tax thus levied and appropriated, and to the officers, for his pay, and he thereby discharges the corporation from any and every kind of liability therefor. In such a case the warrant is given and received in full satisfaction for the services rendered or the material furnished": See *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651; *People v. May*, 9 Colo. 404, 12 Pac. 839.

From the view we take of the question considered, it follows that the answer to the second question must also be in the affirmative. This makes it unnecessary for us to pass upon the other questions presented on this appeal.

It may be the decision of this case will work a hardship upon those whose money has been the means of supplying the city with water for the time disclosed by the pleadings. In this regard, "it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases": *Buchanan* 539 v. *Litchfield*, 102 U. S. 278; *Sanford v. Gates*, 21 Mont. 277, 290, 53 Pac. 749; *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651. And in this connection it is to be observed that, where the powers of a city to incur indebtedness are limited, it becomes the duty of one who contracts with such a city, whereby an indebtedness is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness is in excess of the constitutional limitation: *French v. Burlington*, 42 Iowa, 617; *Buchanan v. Litchfield*, 102 U. S. 278.

The importance of this case, because of the questions and amount involved, and the rights necessarily to be determined, has led us to give it most careful consideration, and after so doing we are of opinion that the judgment of the court below should be affirmed, and it is so ordered.

MUNICIPAL INDEBTEDNESS.—CONSTITUTIONAL LIMITATIONS upon municipal indebtedness are discussed in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243. See, also, the recent case of *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476. A debt beyond the constitutional limit of a city cannot be created even for current expenses, no matter how urgent: *Laporte v. Gamewell etc. Co.*, 146 Ind. 466, 58 Am. St. Rep. 350, 45 N. E. 588.

MUNICIPAL INDEBTEDNESS.—PERSONS BECOMING CREDITORS of a municipal corporation must ascertain at their peril whether the credit they extend will carry the municipal indebtedness beyond its statutory or constitutional limit: See the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 242; *National Life Ins. Co. v. Mead*, 13 S. Dak. 37, 79 Am. St. Rep. 876, 82 N. W. 78.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

**MIDDLESEX WATER COMPANY v. KNAPPMANN
WHITING COMPANY.**

[64 N. J. L. 240, 45 Atl. 692.]

WATER COMPANIES—FAILURE TO SUPPLY WATER—LIABILITY FOR LOSS BY FIRE.—Where a water company expressly contracts to supply water to a factory for fire purposes, and by reason of a failure to do so the factory is destroyed by fire, the water company is liable for the resulting loss, notwithstanding the failure to supply the water was due to the breaking of pipes without any fault on the part of the water company.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—LIABILITY.—Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, and if, by some unforeseen accident the performance is prevented, he must pay damages for not doing it, no distinction being made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen.

CONTRACTS—PERFORMANCE—IMPOSSIBILITY OF, IMPOSED BY LAW.—The performance of an express contract to do a particular thing is excused where the subsequent impossibility of performance is imposed by law.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—EXISTENCE OF SUBJECT MATTER.—The performance of an express contract is excused where the continued existence of something essential to the performance is an implied condition in the contract.

CONTRACTS FOR PERSONAL SERVICES—IMPOSSIBILITY OF PERFORMANCE.—The performance of contracts for purely personal services, where the life or health of the contracting party is essential to their execution, is excused by the death or illness of the contracting party.

The Middlesex Water Company sued the defendant to recover an amount due for water supplied to it; and for connecting the defendant's premises with the mains of the plaintiff. The controversy arose with respect to defendant's claim for

damages made by way of recoupment, for loss by fire due to the failure of the plaintiff to perform its contract and supply the defendant with water.

Edward S. Savage, for the plaintiff in error.

Frank Bergen and Charles L. Corbin, for the defendant in error.

243 DEPUE, J. The application in writing of the manufacturing company for water was accepted by the water company, and became a contract of the parties respectively. The water company in its declaration sets out the contract as expressing the terms of its agreement, as well as the agreement on the part of the defendant. The bill of particulars shows that the water company's claim against the defendant was founded on this agreement. The water company in this suit sued for and recovered payments for water under the contract which became due July 1, 1898 (one hundred and fifty dollars), and October 1, 1898 (one hundred and fifty dollars), as the fire in question took place in May, 1898. The litigation, therefore, must be decided upon the terms and legal effect of this paper as the agreement *inter partes*.

The facts briefly are these: The water company, having accepted the proposition of the defendant, connected defendant's works with its mains, in accordance with the contract, in November, 1897, purchased and set up a meter and began to supply the defendant with water. The plant of the water company, with its pumping-station, is located at South Plainfield, and its principal main extends, in an easterly direction, from South Plainfield, through the villages of Metuchen, Woodbridge and Seawaren, to the village of Carteret, on Staten Island, a distance of about fifteen miles. Between Woodbridge and Carteret the main crosses a stream in which **244** the tide ebbs and flows. The main at that point was laid at the bottom of the stream and was often submerged several feet below the tide. On the night of the 18th of May, 1898, a connection of the blow-off in the principal main of the water company gave way at a point where it crosses the stream, whereby water was discharged and the usual pressure was removed. The water company was notified of the absence of pressure, about 11 o'clock in the evening of the 18th, and immediately the superintendent and others set out to find the cause. It was a difficult leak to find, owing to the fact that the opening was under the waters of the creek.

The men found it about 4 o'clock in the morning of the 19th. By that time the tide was so high that it was impossible to repair it, and it was necessary to wait until low tide, which occurred about noon of the 19th, and the superintendent began to open the gate, just west of the creek, at 2 o'clock, taking about twenty minutes to do so. On the day following the break in the pipe the defendant's factory caught fire, and, with its contents, was burned and destroyed, with a loss to the defendant of sixteen thousand eight hundred and eighty-nine dollars, after deducting insurance and salvage. No notice of the break in the pipe was given to the defendant. There is some conflict in the evidence as to whether the pressure was on the main at the defendant's works at the time the fire broke out. In view of the judge's instruction, it must be assumed that the pressure was not on, or that question must have gone to the jury. It must also, for the present purposes, be assumed that the burning of the building was the result proximately of the failure of plaintiff to furnish water with a pressure sufficient for fire purposes. If any question of the causal connection between the failure to supply water and the fire was involved, that also would have been a question for the jury.

As already observed, this contract was an agreement *inter partes*. Cases such as *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1, *Beck v. Kittanning Water Co.* (Pa., Oct. 1887), 11 Atl. 300, and *Boston Safe Co. v. Salem Water Co.*, 94 Fed. 238, which hold that where the contract of the water ²⁴⁵ company is with the city no privity of contract exists between the water company and an inhabitant of the city whose property was destroyed by fire, to lay the foundation of an action against the company, do not apply to this case.

The water company, by this agreement, in express terms contracted with the defendant to furnish to it water suitable for drinking purposes and other domestic uses and for use in steam boilers, and with a pressure sufficient for fire purposes, the manufacturing company stipulating in the same connection that it would take water for a supply of its factory and for fire purposes for the period of five years and pay for it the stipulated price. The construction of the agreement is free from doubt. The premises to which the contract related were a factory with its contents. The enumeration in the contract of the purposes for which the water was contracted for comprehends the supply of water appropriate to and adequate for all the enumerated purposes.

The construction of this agreement by the learned judge at the trial presents the merits of this controversy. His instruction was as follows: "Under this agreement there is no express contract by the water company that it will furnish water uninterruptedly for five years to the defendant. There is no agreement that an unavoidable accident will not happen causing temporary stoppage of the water supply, but the agreement on the part of the defendant to take water and pay for it imposed on the water company the duty of exercising reasonable care in the construction and maintenance of the waterworks in such a way as to give a proper supply of water to the defendant during the term of five years. If, therefore, the water company was guilty of any negligence in these respects, it is liable for such damages as proximately resulted from such negligence." On this construction of the agreement the judge directed a verdict for the plaintiff. To this ruling the defendant excepted.

The agreement contained an express contract to furnish water for fire purposes without condition or qualification. The learned judge, by his construction, introduced into the ²⁴⁶ agreement a qualification that would exempt the water company from performing its agreement in cases where, without negligence on its part, the supply of water was cut off. To sustain this construction counsel rely mainly on *Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417. In that case the Mill Dam Foundry Company were proprietors of a foundry. They entered into an agreement with Hovey to manufacture iron, steel, etc., on hand. The foundry company, although they were lessees of the works under the Boston Water Power Company, were, as between the parties to the suit, under an obligation for the continuance of the water power. They made a contract with Hovey for the manufacture for them of certain iron, steel, etc., on hand into plate-iron for the market, the foundry company binding themselves to furnish all the iron, steel, and other materials used in and about said manufacture. One of the mill dams was broken by a high tide. At that time the defendant had on hand a large quantity of materials in different states of manufacture. The dam was repaired with due diligence and the waters restored. In a suit by the foundry company against the defendant for the nonperformance of his agreement to manufacture, the defendant treated the covenant to repair as a condition which authorized him to repudiate the entire com-

tract. The defense was disallowed. The case turned on the distinction between a condition and a covenant. The court held that if the breaking of the dam was not a substantial suspension and destruction of the water power for manufacturing purposes, but only a temporary diminution subjecting the defendant to some loss and inconvenience, it was not a breach of a condition precedent which would absolve him from further performance of his contract, although he might have remedy by an action for damages. The result in that case is analogous to the decisions of this court with respect to covenants which are not conditions precedent: *Blackburn v. Reilly*, 47 N. J. L. 290, 308, 54 Am. Rep. 159, 1 Atl. 27; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 51 Am. St. Rep. 612, 31 Atl. 401. The actual decision of the Massachusetts court is upon an issue not in this case, and the ²⁴⁷ principle adopted by the court, so far as it is applicable to this litigation, is adverse to the claim of the water company. Chief Justice Shaw, in delivering the opinion of the court, on page 441 of the reported case, says: "The distinction is now well settled between an obligation or duty imposed by law and that created by covenant or act of the party. When the law creates a duty, and the party is disabled from performing it without any default of his own, the law will excuse him; as, in waste to a tenement, if the same be destroyed by tempest or enemies, the lessee is excused; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. The good sense of the rule seems to be this, that in a case where, if an event happened, it must inevitably cause loss and damage to one or the other of the contracting parties, the party who has contracted that such an event shall not happen, although he cannot specifically perform that contract, because the event may happen through the act of God or inevitable necessity, yet he shall stand to that risk, and make good all the loss which shall occur in consequence of the happening of the event contemplated. The party thus contracting takes the consequences." The defense made in that case was overruled on the ground that the contract between the parties did not create a condition which would justify rescission—that the plaintiffs' remedy was in an action on the covenant for damages.

The portions of the chief justice's opinion which are pressed upon the consideration of this court are his observa-

tions with respect to the construction of such a contract when expressed in general terms, and implied qualifications and exceptions are obviously necessary to carry into effect the intentions of the parties collected from the whole contract—qualifications which are founded on the presumption that the parties who enter into a contract with reference to a business are presumed to understand how that business is usually carried on and to have reference to such known circumstances in ²⁴⁸ making their contracts. The illustrations given are contracts for the supply of water power, in which it must be presumed that the parties know that such power may and must necessarily be occasionally interrupted; that on a few very cold days in winter the ice will clog the wheel; that it may take several hours to clear it; that a freshet may carry away a gate, and that it will take a few days to replace it; that the covenants, though in general terms, are to be taken with these necessary and implied exceptions. These remarks apply to interruptions occasioning temporary inconveniences, where the damage is inconsiderable, and are limited to cases in which the contract is expressed in general terms.

These observations of the chief justice, if they are not limited to the particular defense then before the court, as is made probable by his remarks on page 444, do not apply to the situation of the parties in this suit. The agreement between the parties is not expressed in general terms. The contract is specific and precise—to furnish “water with a pressure sufficient for fire purposes.” The subject matter of the contract concerned the supply of water for use for fire purposes. The parties, in making this agreement, contemplated the protection of the defendant’s premises from a loss by fire, which might happen at any time, and occasion not merely a temporary inconvenience, but an entire destruction of property. The covenant to pay rent, which at common law bound the tenant to pay, although the premises were destroyed by accident, is never more explicit than the plaintiff’s agreement in this case. In *Chicago etc. Ry. Co. v. Hoyt*, 149 U. S. 1, 12, 13 Sup. Ct. Rep. 779, it was held that if a contracting party absolutely binds himself to perform things which subsequently become impossible of performance, or to pay damages for the nonperformance thereof, and the thing which causes the impossibility might have been foreseen and guarded against in the contract or arose from the act or default of the promisor, he will be held to the strict performance of his

contract. Where a contract is valid and is not performed or ²⁴⁹ excused, the obligation to pay damages arising from the nonperformance is implied by law. The general rule of law applicable to such agreements is that "where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible": Pollock on Contracts, 362. The exceptions to the generality of this rule of law are few and will be stated presently.

The leading case on that subject is *Paradine v. Jane*, Aleyn, 26. The decision in that case is stated in the opinion of Mr. Justice Whelpley in *Superintendent etc. v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373, with an extensive citation of cases to the same effect. In his opinion the learned justice says: "No rule of law is more firmly established by a long train of decisions than this—that where a party, by his own contract, creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenants to repair a house, though it be burned by lightning or thrown down by enemies, yet he is bound to repair it. . . . No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should do it unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it. The law will not insert, for the benefit of one of the parties, by construction, an exception, which the parties have not, either by design or neglect, inserted in their engagement." In that case it was decided, among other things, that the damage occasioned by the destruction of the building by a gale of wind must be borne by the contractor, who entered into a contract to build ²⁵⁰ and erect a building. In a similar case Mr. Justice Swayne, in delivering the opinion of the court, referred to *Superintendent etc. v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373, and other cases, and said: "The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason

and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation the law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated": *Dermott v. Jones*, 2 Wall. 1. In *Jones v. United States*, 96 U. S. 24, under an executory contract for the manufacture and delivery of goods at a specified time, it was held that the failure to comply with the terms of the contract with respect to the time of delivery was not excused by the fact that the mill in which the cloths were manufactured was destroyed by fire, and that, consequently, the party failed to make deliveries of the cloths as the contract required.

In the English courts the rule laid down in *Paradine v. Jane*, Aleyn, 26, has been adhered to with great tenacity. In *Atkinson v. Ritchie*, 10 East, 530, the master agreed with the freighter that he would proceed to St. Petersburg and there load for the freighter a complete cargo, and deliver the same at London. It was held in that case that the master, after taking in at St. Petersburg about half a cargo and sailing away upon a general rumor of a hostile embargo being laid on British ships by the Russian government, was liable in damages for the short delivery of the cargo, though the jury found that he acted bona fide and under reasonable and well-grounded apprehension at the time. Chief Justice Lord Ellenborough, delivering the opinion of the court, said: "No exception which is not contained in the contract itself can be engrafted upon it by implication as an excuse for its nonperformance. The rule laid down in the case of *Paradine v. Jane*, Aleyn, 26, has often been recognized in courts of law as a sound one—i. e., that 'when the party by his ²⁵¹ own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract': *Atkinson v. Ritchie*, 10 East, 530, 533. The English and American cases are stated in 1 *English Ruling Cases*, 338-351, and in 6 *English Ruling Cases*, 597-617, and also in 1 *American and English Encyclopedia of Law*, second edition, 588-590.

The principle underlying all these cases is that where the contract is express, as it is in this case—to furnish water with a pressure sufficient for fire purposes—to do a thing not un-

lawful, the contractor must perform it, and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent persons must sustain a loss, the law, as was said by Mr. Justice Whelpley casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement.

To this general rule there are three exceptions. I know of no other. They are stated in the English notes (6 Eng. R. C. 611) as follows: "1. Where the subsequent impossibility is imposed by law; 2. Where the continued existence of something essential to the performance is an implied condition of the contract; 3. In contracts for personal services, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness." The first of these exceptions exists where there is a declaration of war between two countries, of which the parties severally were inhabitants, which made the performance of the contract illegal: *Esposito v. Bowden*, 7 El. & B. 763; *Hillyard v. Mutual Ben. Life Ins. Co.*, 35 N. J. L. 415, 418, 422; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741. The second exception is illustrated in the case of *Taylor v. Caldwell*, 3 Best & S. 826; 6 Eng. R. C. 603. The defendant in that case agreed to let certain gardens and a music hall to the plaintiffs, for four specified days to come, for the purpose of giving a series of concerts. After the agreement was entered into, and before the day arrived for the first concert, the music hall was accidentally destroyed by fire. It was held that as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect to its performance, and that no action would lie against them. In that case the agreement was wholly executory, and the result is placed by Mr. Justice Blackburn on the principle that "where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular, specified thing continued to exist, so that when enter-

ing into the contract they must have contemplated such continued existence as the foundation of what was to be done." This doctrine was applied in the supreme court of New York to an executory contract for the sale and delivery of specified articles of personal property which were accidentally destroyed by fire before the time for delivery: *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415. In a subsequent case in the same court, in an opinion delivered by the same judge, it was held that, under a contract to deliver a certain manufactured article within a specified time, the destruction by fire of the defendant's rolling-mill, which prevented the defendant from completing its contract by the time fixed in the agreement, did not excuse the defendant's failure to perform the contract, even though the accident prevented performance: *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487.

The third class comprises contracts for purely personal services where the life or health of the contracting party is essential to the execution of the contract: *Robinson v. Davison*, L. R. 6 Ex. 269. Cases in the first and third classes have no relevancy to this litigation.

Cases in the second class, of which *Taylor v. Caldwell*, 3 Best & S. 826, is ²⁵³ the leading case, were decided upon executory contracts and proceed on the ground that the existence of the subject matter of the contract at the time of performance was a condition upon which the contract itself took effect. In *Taylor v. Caldwell*, 3 Best & S. 826, the music hall was destroyed by a cause *ab extra* before the time for the performance of the contract, and performance having become impossible, the contract was entirely put at an end as to both parties. In this case the interruption of the delivery of water by the breaking of the pipe was a temporary interference with the performance of the plaintiff's contract. The failure to deliver water for the period required to repair the break did not justify either party in rescinding the contract as for a breach of condition. The case cited from the Massachusetts courts establishes that fact conclusively: *Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417. The defendant's factory was, at the time of the breach of this contract, standing in a condition to receive and use water. Its destruction is alleged to have been due to the failure of the plaintiff to supply water. It was not due to any antecedent cause *ab extra*, and the plaintiff cannot set up the destruction of the premises, imputable to its own breach of contract, to discharge it from the consequences of its

failure to perform one of its terms. If the plaintiff's water-works had been accidentally destroyed, in an action by the defendant for not continuing to supply water under the contract, or in a suit against the defendant for the payments reserved for the use of water after the destruction of its factory, under the ruling in *Taylor v. Caldwell*, 3 Best & S. 826, a different question might have arisen. Decisions in this aspect cannot be permitted to have application to the circumstances of this case unless *Paradine v. Jane*, Aleyn, 26, *Superintendent etc. v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373, and the long line of cases, English and American, holding the principles adjudged in those cases, are set aside.

Applying the rules of law adjudged in the cases, and especially in *Superintendent etc. v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373, we have here this condition of affairs: The water company expressly contracted to supply water for fire purposes. The company failed to do ²⁵⁴ so, and the premises of the defendant took fire, occasioning a considerable loss. Assuming that this result was due to the breaking of the pipes, without any fault on the part of the water company, we have a loss to be borne by one party or the other. In such a condition of affairs, to adopt the language of Mr. Justice Whelpley: "Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or, rather, the law leaves it where the agreement of the parties has put it. . . . Between accidents by the fault of the contractor and those where he is without fault, they all rest upon the same principle—such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible."

The construction by the trial court of the agreement was erroneous, and the judgment should be reversed.

CONTRACT.—IMPOSSIBILITY OF PERFORMANCE does not relieve a party from his obligation to perform a contract: Note to *Harmony v. Bingham*, 62 Am. Dec. 151; *Anderson v. May*, 50 Minn. 290, 36 Am. St. Rep. 642, 52 N. W. 530. This doctrine does not obtain, however, where the impossibility results from act of law: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135, 11 S. E. 442; nor where the contract assumes the existence, and is based upon the existence, of an essential fact that does not exist: *Nordyke v. Kehlor*, 155 Mo. 643, 78 Am. St. Rep. 600, 56 S. W. 287; nor where the subject matter of the contract is destroyed: *Angus v. Scully*, 176 Mass. 357, 79 Am. St. Rep. 318, 57 N. E. 674; *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667. But see the note to *Huyett etc. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 285. Furthermore, a contract to perform personal services requiring skill

and ability of a high order is subject to the implied condition that the party shall be alive and well enough to perform it: *Marvel v. Phillips*, 162 Mass. 390, 44 Am. St. Rep. 370, 38 N. E. 1117.

Liabilities of Water Companies.*

Under this head we shall treat of the general liability both of water companies which supply the inhabitants of municipalities and irrigation companies which supply water for irrigation and domestic purposes.

General Liability for Failure to Supply Water.—The principal case is authority for the proposition that a water company must perform its contracts the same as any other corporation or individual, and a failure so to do will subject it to any liability which proximately flows therefrom. There is no doubt of the soundness of this rule. A water company, contracting to furnish water under a certain pressure for all purposes, including that of extinguishing fires, is liable for a loss by fire which results from the failure of the company to furnish the adequate pressure: *New Orleans etc. R. R. Co. v. Meridian Water Works Co.*, 72 Fed. 227. And where a water company, under a contract with a city to supply water in such force and quantity as to afford first-class protection against fire fails to comply with the terms of its contract, the city may have the contract rescinded: *Light etc. Co. v. Jackson*, 73 Miss. 598, 19 South. 771. A water company is liable for breach of warranty, where it fails to comply with a stipulation in its contract by which it guarantees to furnish a force of water sufficient to throw from any fire hydrants, at the same time, five streams of water seventy-five feet high: *Wilson v. Charlotte*, 108 N. C. 121, 12 S. E. 848. Where a water company undertakes by contract with a city to perform the public duty, with which the city is charged, of supplying water for fire purposes, the water company cannot arbitrarily shut off the water without making some provision to protect the city from fire, and a court of equity will enjoin such act. A suit for such an injunction is not one for specific performance, strictly speaking, but is rather to enforce the performance of a public duty: *Blenville Water Supply Co. v. Mobile*, 112 Ala. 200, 57 Am. St. Rep. 28, 20 South. 742. A water company is, however, only bound by the terms of its contract. Hence, where a contract merely calls for the ordinary supply of water to be used in connection with the plaintiff's brewery, but there was no stipulation that the company should supply water for the extinguishment of fires, the water company owed the plaintiff no duty in this respect, and was not liable to him for a loss by fire due to a deficiency of water: *Beck v. Kittanning Water Co. (Pa.)*, 11 Atl. 300. And a city cannot by a mere ordinance require a water company to supply water otherwise than is provided by an existing contract between the city and the company: *House*

***REFERENCES TO MONOGRAPHIC NOTES.**

Liability of municipal corporations for injuries resulting from negligence in supplying water: 6 Am. St. Rep. 399-401.

Liability of water company to citizen for loss by fire: 33 Am. Rep. 5-9.

v. Houston Water Works Co. (Tex.), 22 S. W. 277. Where a water company is under contract to furnish water to the inhabitants of a city, a single inhabitant may by mandamus compel the company to furnish him with water. That this remedy may be resorted to is due to the public character of the water company's franchises, and the public duty it is under to supply water to all who pay certain rates therefor: *People v. New York etc. Water Co.*, 38 App. Div. 486; 56 N. Y. Supp. 364; *In re McGrath*, 56 Hun, 76; 9 N. Y. Supp. 168. In Pennsylvania, if the water supply furnished by a water company is impure or deficient in quantity, a private citizen is authorized by statute to sue to compel the water company to correct the evil complained of. And it is held that a city has, under such statute, the same right to sue as a private citizen: *Du Bois Borough v. Du Bois City Water Works Co.*, 176 Pa. St. 430, 53 Am. St. Rep. 678, 35 Atl. 248.

Similar to mandamus is the remedy by injunction, whereby a consumer may prevent a water company from shutting off the supply of water: *Blenville Water Supply Co. v. Mobile*, 112 Ala. 200, 57 Am. St. Rep. 28, 20 South. 742. A water company accepting a franchise to furnish a city and its inhabitants with water assumes the performance of a public duty, and consequently it must supply the public without discrimination, and this duty may be enforced by any individual injured, either by mandamus or by injunction, depending on the circumstances: See *Haugen v. Albina etc. Water Co.*, 21 Or. 411, 28 Pac. 244. In *West Hartford v. Board of Water Commrs.*, 68 Conn. 322, 36 Atl. 786, the board of commissioners of the city of Hartford were empowered to take water from streams in the plaintiff town, on condition that it would furnish water to the inhabitants of such town who lived "within a reasonable distance" from the line of main pipes. The board for thirty years supplied water to residents who lived as far away as three-quarters of a mile. The court held that the board after such a practical construction of its contract could not arbitrarily declare a party too far away, but that the question whether a resident lived within a reasonable distance was one for the court, and the board could be compelled to furnish water to those residents who lived within such a distance of the main pipes. Where a company is under contract to extend its mains in a city, it may be compelled to perform its duty by mandamus: *Topeka v. Topeka Water Co.*, 58 Kan. 349, 49 Pac. 79. If a pipe has already been laid along a street, a property owner along such street may compel the company to connect with his property, and it is no defense that the pipe line was constructed for the sole purpose of supplying another party who paid for the pipe, and who would not consent to have the pipe tapped for the benefit of other persons. The private owners for whose benefit the pipe was originally laid had no rights whatever in the street. The pipe was necessarily laid under the franchise granted by the city to the company to supply water to the inhabitants. This was a public purpose, and the company could be compelled to supply all residents alike:

Haugen v. Albina etc. Water Co., 21 Or. 411, 28 Pac. 244. A water company cannot refuse to supply a tenant with water, because it has a rule that it will only deal with the owners of property, the owner refusing to be responsible for the water rent. Such a rule is unreasonable, and a tenant who tenders payment for the water can compel the company to furnish it to him: *State v. Butte Water Co.*, 18 Mont. 199, 56 Am. St. Rep. 574, 44 Pac. 966. A water company cannot shut off water from a consumer for nonpayment of an old, overdue, and disputed installment of water rates, after having accepted payment for a subsequent installment. The water taker may prevent such action by injunction: *Wood v. Auburn*, 87 Me. 287, 32 Atl. 906.

Liability for Loss by Fire.—The question has been frequently raised as to the liability of a water company for a loss by fire due to the failure of the water company to supply sufficient water for fire protection. As has already been seen, if the water company contracts to supply a certain pressure of water for fire purpose, and a failure to do so is the proximate cause of a loss by fire, the company will be liable to the party with whom such contract is made for any loss which he has suffered. The principal case enunciates a similar doctrine. As to this rule there can be no doubt it is a simple question of the breach of an express contract and the recovery of damages which directly flow therefrom. The question, however, is one of more difficulty where the loss is sustained by one for whose benefit the contract is made, but who has entered into no contractual relations with the water company. Such a case occurs where a company contracts with a city to furnish an adequate water supply for fire protection, and by reason of a breach of this contract the property of a citizen is burned. The authorities are in conflict as to whether the injured citizen has a right of action against the water company. The great weight of authority denies the right of a citizen to recover for the loss sustained: See *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Mott v. Cherryvale Water etc. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989; *Becker v. Keokuk Water Works*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784; *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Davis v. Clinton Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546, 40 Am. St. Rep. 510, 56 N. W. 201; *House v. Houston Water Works Co.*, 88 Tex. 233, 31 S. W. 179; *Nickerson v. Bridgeport etc. Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Foster v. Lookout Water Co.*, 3 Lea. 42; *Bush v. Artesian etc. Co. (Idaho)*, 43 Pac. 69. The ground upon which a recovery is denied is that there is no privity between the water company and the citizen injured. The contract is with the city alone: *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Fowler v. Athens City Water Works Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546, 40 Am. St. Rep.

510, 56 N. W. 201. The fact that the injured citizen is a taxpayer who pays a special tax for the purpose of paying the water company for supplying the city with water for fire protection does not create any privity of interest between the taxpayer and the water company: *Becker v. Keokuk Water Works*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 604; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784; *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546, 40 Am. St. Rep. 510, 56 N. W. 201.

The point has been presented in many of the cases that a third party may sue upon a contract made for his benefit, and that this is the precise character of the situation when a water company contracts with a city to furnish water to protect the city and the property of the inhabitants from fire. It should be remembered, however, that it is not every contract for the benefit of a third party that confers upon such third party a right to sue thereon. As was suggested in *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784, a third person who is only indirectly and incidentally benefited by a contract has no right of action thereon, and the court applied this rule to a contract of the character in question. But a more satisfactory reason is given in some of the cases why a citizen cannot hold the water company liable on such a contract, though it is made for his benefit. Thus in *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485, it was said that to entitle a third party to sue on a contract made for his benefit, "there must be some privity between him and the promisee, and some obligation or duty owing from the latter to him, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. 'A legal obligation or duty owing from the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration with the promisee, the obligation of the promisee furnishing an evidence of the interest of the latter to benefit him, and creating a privity by substitution with the promisor.'" A city being under no legal obligation to furnish water for protection against fire, it follows that a citizen has no right of action upon a contract with a water company to furnish adequate fire protection. This subject of the right of a citizen to sue on a contract made for his benefit will be found more fully treated in the monographic note in 71 Am. St. Rep. 196.

A water company cannot be held liable in tort any more than it can upon contract: *Fitch v. Seymour Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Fowler v. Athens City Water Works Co.*, 68 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673. In this last case the court said: "The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to private property of an individual, though he is a member of the community and a taxpayer to the government. . . . We are unable to see how a contractor with the city to sup-

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ply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is super-added a legal command by statute or express law."

A municipal ordinance, accepted by a water company, which requires the company to supply the city and its inhabitants with water for private and public purposes, including the putting out of fires, does not create contractual relations between such company and the inhabitants of the city as individuals, so as to render the company liable to the inhabitants for a loss by fire due to a failure of the water supply: *Britton v. Green Bay etc. Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84. An insurance company, which has been compelled to pay a loss by fire caused by the failure of the water supply, stands in no better position than a citizen, and cannot hold the water company liable for the loss: *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118.

The fact that a contract between a city and a water company contains a stipulation that the company will pay all damages that may accrue to any citizen by reason of the failure on the part of the company to supply a sufficient amount of water, or a failure to supply water at a proper time, or by reason of any other negligence, does not render the company liable to an action by a private citizen who has suffered a loss by fire caused by the company's failure to supply water: *Mott v. Cherryvale Water etc. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989; *Howsmen v. Trenton Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784; *Vanhorn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 283. Such a contract seems to be beyond the power of a municipal corporation to make. "The law which authorizes cities to contract with individuals and companies for the building and operating of water-works confers no powers upon a city to make a contract of indemnity for the individual benefit of a taxpayer, for a breach of which he could maintain an action in his own name": *Becker v. Keokuk Water Works*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 604. This was quoted with approval in *Mott v. Cherryvale Water etc. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 28 Pac. 989. A municipality has not such an interest in the property of a citizen by reason of its being taxable property that it can hold a water company liable for its loss by fire which results in a diminution of taxable property. The right of taxation is too remote and uncertain an interest to be the foundation for a claim against a water company: *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485. Neither can a city, in a suit against it to recover for water supplied by a water company, be allowed to set off or recoup damages sustained by private persons, citizens, and property owners, on account of property destroyed by fire due to the insufficiency of water supplied by the company to extinguish fires: *Montgomery v. Montgomery Water Works*, 79 Ala. 233.

The cases are few indeed which sustain the right of a citizen to recover from a water company for a loss by fire due to the failure to supply water, upon a contract made solely with the city. *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, is the leading authority, and almost the only one. The supreme court of Kentucky in this case sustains the right of an action by a private citizen upon the ground that a third party may sue upon a contract made for his benefit, and that a contract of this character is essentially for the benefit of the individual property owner. The court also holds that in entering into such a contract with a water company it is both the right and the duty of the city to make it for the personal benefit of inhabitants within its corporate limits. The doctrine of this case was approved in the later case of *Owensboro Water Co. v. Duncan*, 17 Ky. Law Rep. 755, 32 S. W. 478, and the same case was followed in *Gorrell v. Water Supply Co.*, 124 N. C. 828, 70 Am. St. Rep. 598, 32 S. E. 720. The defendant here contracted to furnish a sufficient quantity of water to extinguish fires in the city. The court points out that upon the face of the contract the principal beneficiaries were the water company on one side and the individual citizens of the city on the other, and that the benefit to the nominal contracting party was small as compared with the benefit to the citizens, and, taken alone, would never have justified the grants, concessions, privileges, benefits and payments made to the water company. The court, therefore, holds that the one for whose chief benefit the contract was made may sue upon it to recover for damages resulting from its breach. These cases in no sense take the position that the water company is an insurer, but simply that such company must perform its contract, and a failure to do so will subject it to liability for any damages which are the proximate result of such breach. Hence, where the fire apparatus furnished by the city was insufficient for the quantity and force of water actually supplied, the water company is not liable, notwithstanding its failure to supply the pressure of water called for by its contract, since such failure could not be the proximate cause of the injury: *Owensboro Water Co. v. Duncan*, 17 Ky. Law Rep. 755, 32 S. W. 478. This same case is authority for the rule that where the contract exempts the company from liability for a failure to supply water occasioned by unavoidable accident, the company cannot be held liable to a citizen where the uncontroverted evidence shows that the failure was so caused.

Liability for Furnishing Impure Water.—A water company engaged in distributing water for compensation does not impliedly warrant the quality of the water carried and distributed: *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 911, 77 N. W. 722. A water company is not liable for an injury due to impure water which it has furnished in the absence of negligence. Hence, where the illness and death of the plaintiff's children from typhoid fever

were caused by contaminated water, but the contamination came from the act of strangers over whom the company had no control, and the act was without its knowledge or consent, and the impurity of the water was unknown to it, the company was held not liable for the injury which resulted to the plaintiff: *Buckingham v. Plymouth Water Co.*, 142 Pa. St. 221, 21 Atl. 824. If, however, a water company knowingly distributes water which is dangerous for domestic use, it must disclose such danger to its consumers, and a failure to do so is fraud in law, rendering the company liable to any person injured thereby without fault on his part. The failure to notify consumers is actionable negligence. On the other hand, if the consumer used the impure water with knowledge of its dangerous condition, or if the circumstances were such that he should have known of its condition, no legal liability attaches to the company: *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 911, 77 N. W. 722. Under a contract to supply water from a certain river of good quality, filtered, or settled, and fit for domestic use, the company is only required to furnish water of as good quality and as fit for domestic use as could be obtained from the river designated by filtering or settling. Hence, if the water is hard, the company is not liable because it fails to furnish soft water. Neither is it liable for a breach of its contract because the water is discolored by reason of the river being high and turbid: *Grand Junction Water Co. v. Grand Junction*, 14 Colo. App. 424, 60 Pac. 196. A water company which contracts to filter water for domestic use must do so, and upon failure a court of equity will compel it to specifically perform its contract, even though by reason of the growth of the city the original filter has been rendered inadequate, and it is necessary to put in new machinery of much larger capacity: *Burlington v. Burlington Water Co.*, 86 Iowa, 206, 55 N. W. 246. Under a statute authorizing any citizen to sue a water company which furnishes impure water for the purpose of correcting the evil, a city has the same right as a citizen to bring an action against a water company: *Du Bois Borough v. Du Bois City Water Works Co.*, 176 Pa. St. 480, 53 Am. St. Rep. 678, 35 Atl. 248. Mandamus seems to be an appropriate remedy always open to an inhabitant to compel a water company to furnish him with pure water. The public character of its franchises and the public duty with which it is charged makes such a proceeding proper: *People v. New York etc. Water Co.*, 38 App. Div. 413; 56 N. Y. Supp. 384.

Liability to Riparian Owners for Taking Water from Stream.—Not even a riparian owner has a right to divert a stream permanently from its natural course, and thus deprive lower riparian owners of their rights therein. Hence, the permanent diversion of the waters of a stream by a water company for the purpose of supplying a neighboring town with water is unlawful, and may be enjoined by a lower riparian proprietor: *Rigney v. Tacoma etc. Water*

Co., 9 Wash. 576, 38 Pac. 147. The fact that the water company was chartered for the purpose of supplying a certain city with water, and is under a contract with the city to supply such water, does not give the corporation any additional rights to use or appropriate the waters of a well-defined stream flowing through the lands of another: *Tampa Water Works Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780. Every riparian owner has an equal right to have the stream flow through his land in its natural state, without material diminution in quantity, with the limitation that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes. Hence, if a water company diverts great quantities of water from a stream to supply a neighboring town, without restoring it to its natural channel, this is a wrongful act, for which an action will lie by a lower riparian owner: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78. See *Hogg v. Connellsville Water Co.*, 168 Pa. St. 458, 31 Atl. 1010. A water company cannot divert the waters of a stream for the use of communities for domestic purposes in violation of the prior rights of others who have appropriated the water for agricultural and manufacturing purposes, unless just compensation is made: *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 Pac. 532. Even a legislative grant to a water company, giving it the exclusive right to conduct water to a city for a term of years, confers no right to divert the waters of a running stream to the injury of riparian owners, without making compensation therefor. Where no compensation has been paid, the riparian owner may sue and recover damages: *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453. While a water company, acting under legislative authority, may take the waters of a stream, yet it is liable to riparian owners injured thereby: *Ingraham v. Camden etc. Water Co.*, 82 Me. 335, 19 Atl. 861. A riparian proprietor is entitled to recover nominal damages for any disturbance of his right, without proof of actual damage: *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453. But if he has suffered no actual damage he can recover nominal damages alone: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78. For the diversion of the waters of a creek in violation of a riparian owner's rights, he may have an injunction, though he suffers no actual damage thereby: *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758. But where a water company is wrongfully taking water from a stream to supply a city, a lower riparian owner is entitled to an injunction for the wrongful diversion, only so far as it is necessary to vindicate his right, and prevent the loss of it by adverse user and lapse of time, where he is taking no advantage of his right to use the water, but allows it to flow by unutilized, it appearing to be of no special value to him: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78. A lower riparian owner may, of course, be deprived of his right of action against a water company for its diversion of the

waters of a stream if the water company has acquired a right to divert the water by adverse user: *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Cox v. Clough*, 70 Cal. 345, 11 Pac. 732; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

Municipality Furnishing Water.—We are not primarily concerned with the liability of cities which own waterworks and supply water to their inhabitants. This question has been treated in the note in 30 Am. St. Rep. 399, and the general rule was correctly stated to be that: "In performing the duty of supplying water for use in extinguishing fires, we think the authorities agree in denying municipal liability for negligence, whether it results in an inadequate supply of water or in causing the supply to be unavailing, owing to the absence or nonrepair of some necessary appliance. This duty is governmental in its character, not undertaken for the benefit of the municipality, and cannot be performed without exercising quasi judicial or legislative functions, out of the wrongful or negligent exercise of which it is universally conceded no liability to a civil action can arise." Several cases have arisen since this note was written which it will be well to mention, the most important of which is *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405, where the general rule was sustained, the court holding that a municipality in assuming the duty of providing and maintaining a system of waterworks to furnish water for private and domestic purposes, and also for public purposes, such as extinguishing fires, acts for the benefit of the public, and hence in its governmental capacity, though it receives compensation for the water furnished its citizens and property holders. It, therefore, is not answerable in an action to recover compensation for damages alleged to have been suffered from the loss of plaintiff's property by fire through the inadequacy of the water supply, attributable to the negligence or mismanagement of the municipal authorities having charge of the waterworks. To the same effect, see *Planters' Oil Mill v. Monroe Water Works etc. Co.*, 52 La. Ann. 1243, 27 South. 684. Another reason frequently stated for denying liability on the part of a city is that to admit liability would be to cause serious financial embarrassment to cities and towns, and thereby impair their efficiency to perform the functions of municipal governments: See *Eaton v. Fairbury Water Works Co.*, 37 Neb. 548, 40 Am. St. Rep. 510, 56 N. W. 201. In contrast with these decisions and the reasons adduced to support them is the elaborately considered case of *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, which seems to be the sole authority holding that a city which voluntarily assumes the duty of supplying its inhabitants water for general purposes and for extinguishing fires, is liable to a consumer for its negligence, whereby a failure to supply water resulted and his property was destroyed by fire, which but for such negligence would have been extinguished. The opinion in this case points out that municipal liability is admitted in cases of damages sustained by

reason of negligence in the control and management of streets, sewers, drains, docks, bridges, gas and electric works, and asks upon what principle these cases can be distinguished from the case of a city supplying water. "The same reasons," says the court, "that are given for establishing liability in those instances equally apply in this case, and what real difference is there between works of that nature and a water system voluntarily operated by the city for its gain or advantage? The general public or the government has not the same interest in the operation and management of a water system, which is only local in the benefits to be derived from its operation, as they have in the control and operation of the streets and bridges, and docks and waterways under the control of the city. . . . What special privilege or prerogative of sovereignty is there in the operation of a water plant, and what special governmental public purpose is to be accomplished in the operation of such works? . . . It is not enough to say that because the city by its water system serves the public it is a public governmental function, for if such was the case every work or service engaged in or carried on by a municipal corporation could be called a part of its general governmental machinery, for all the property held and used by cities is more or less for public purposes." The opinion is an extended one, and reviews a large number of the cases on municipal liability, but the doctrine it enunciates is against the practically unanimous authority elsewhere.

Municipal corporations owning land upon watercourses have no greater right than any other corporation engaged in the supply of water to divert water from a stream in sufficient quantities to supply the domestic wants of the inhabitants of the city, to the injury of other riparian proprietors: *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453. A municipality does not, by purchasing land on a stream, thereby become such a riparian owner that it can take water from the stream to supply its inhabitants; and a riparian owner injured by such diversion may enjoin the city from diverting the water, unless the city offers to pay whatever sum the court deems will be just compensation for the injury done and to be done, the city having the right to condemn the water under its power of eminent domain: *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367, 41 Atl. 385; affirmed on this point in 45 Atl. 596. Under the Mexican law, a pueblo was entitled to the use of so much of the waters of a stream flowing through it as was necessary for municipal purposes, and for the supply of its inhabitants, and this right was superior to that of riparian proprietors. And the present cities which are the successors of the Mexican pueblos have the same rights as the pueblos: *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762. And while the inhabitants of the territory occupied by the original pueblo, to whatever number they may increase, enjoy the full pueblo right, and are not limited to the amount of water sufficient to supply the original pueblo, it seems that this

right does not extend beyond the limits of the original pueblo; and if the city subsequently extends beyond those limits, and an increased water supply is thereby demanded so that the riparian rights of land owners along the river are encroached upon, the city must pay for those rights the same as for any other private property taken for public use: *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

Liability of Irrigating Company for Failure to Supply Water to Consumers.—A ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and bona fide consumer making seasonable application, and offering proper compensation: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966. A ditch company may acquire a prior right to the water diverted from a stream, provided they apply such water to some beneficial use. But the mere diversion of the water is not an appropriation, and if the water is not within a reasonable time applied to some beneficial use, the company cannot prevent others from acquiring a right to use the water. Water cannot be diverted for purposes of speculation, and if a ditch company has water which is not devoted to some beneficial use, it may be required by mandamus to supply such water to a bona fide consumer who makes application for it and tenders the proper compensation: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487. In the arid states of the west, the public duties which irrigation companies assume, by undertaking to carry water for the purpose of general distribution and sale, are well recognized, and the rights of the public to be supplied with water for irrigation purposes are guaranteed and protected both by the state constitutions and state statutes. Thus in Colorado a consumer has a constitutional right to the use of unappropriated water, or of water in the ditch of an irrigating company undisposed of. This right to water not already applied to a beneficial use, upon a tender of proper compensation, cannot be evaded or qualified by a regulation of the company compelling the purchase of stock as a condition precedent to use: *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487. And this right to use the water may be enforced by mandamus: *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *Merrill v. Southside Irr. Co.*, 112 Cal. 426, 44 Pac. 720; *Price v. Riverside Land etc. Co.*, 56 Cal. 431. Mandamus is not, however, an appropriate remedy to secure a perpetual right to the use of water for irrigation, since the right to use water is an annually recurring right, dependent, among other things, upon an annual tender of the price: *Townsend v. Fulton Irr. Ditch Co.*, 17 Colo. 142, 29 Pac. 453. While an irrigating company may make reasonable rules to govern the supplying of water, yet where a purchaser has failed to make application for

water within the time prescribed by the company's rules, he is not deprived of his right to purchase water, if, when he does make application, the company is free from conflicting obligations, and is in a position to grant his request and supply him with water. And he may enforce his right by mandamus: *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142. A water company is thus compelled to supply water because its business is impressed with a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it was created: *Price v. Riverside Land etc. Co.*, 56 Cal. 431. Under the California constitution, all water set apart and devoted to purposes of sale, rental, or distribution is appropriated to a public use. Hence, an irrigating company which has thus appropriated water to a public use must continue to supply water to lands that it has sold, as well as continue to furnish water to those within the flow and on the line of its ditch who are cultivating land which has been furnished with water for irrigation, at such rates and terms as may be established in pursuance of law. This duty the consumer may enforce by mandamus: *Merrill v. Southside Irr. Co.*, 112 Cal. 426, 44 Pac. 720. And a prior purchaser is entitled to continue to purchase, although he may be able to obtain water from some other source: *Golden Canal Co. v. Bright*, 8 Colo. 114, 6 Pac. 142. Where, however, a consumer purchases water under a contract which reserves to the irrigation company the right to continue to sell water rights up to the carrying capacity of its ditch, and the contract also provides for prorating the water among the purchasers in case there is an insufficient supply from any cause, one consumer has no priority or preference over another by reason of a contract prior in point of time, and the company cannot be restrained by injunction, either from continuing the sale of water rights within the limit mentioned in the contracts, or from prorating the water when the supply is limited as contemplated by the contracts: *Wyatt v. Larimer etc. Irr. Co.*, 1 Colo. App. 480, 29 Pac. 906. In such a case the consumers' rights are based upon contract and must be measured by it, and they have no constitutional right to the water, by reason of using it under a contract prior in point of time, which can be asserted against the company. A consumer may, however, enjoin an irrigation company from selling additional water rights in violation of its contract with him: *Wyatt v. Larimer etc. Irr. Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144. Thus, stockholders in a mutual water company, formed for the purpose of supplying water, within a limited area, for irrigation and domestic uses to its stockholders, in whom the sole beneficial use of the water is vested, may enjoin the company from supplying water to new stockholders, who have been improperly made such, where such diversion will deprive the old stockholders of a portion of the water necessary for the irrigation of their lands and for their domestic use: *McDermont v. Anaheim etc. Water Co.*, 124 Cal. 112,

56 Pac. 779. And consumers who acquired their rights at the original construction of a ditch may, in times of scarcity when only the amount of water to which the ditch is entitled by reason of its original construction is permitted to flow therein, enjoin the ditch company from prorating the water with others using water from the ditch, who acquired their rights to the use of water by later enlargements of the ditch: *Brown v. Canal etc. Co.*, 28 Colo. 66, 56 Pac. 183. Indeed, any unlawful diversion of water from an irrigating ditch, which is prejudicial to the rights of consumers entitled to the flow of water therein, may be enjoined: See *Last Chance etc. Co. v. Emigrant Ditch Co.*, 129 Cal. 277, 61 Pac. 960.

While a consumer's rights are, as has been seen, measured to a considerable extent by his contract with the irrigation company, it should be remembered that such companies when they appropriate water for the purposes of sale and distribution to consumers for domestic and irrigation purposes are engaged in the performance of a public duty, their business is impressed with a public use, and they have not free choice as to whom they will supply with water. Hence, when a company begins to supply a consumer with water for irrigation, it cannot afterward withdraw the same to supply other owners: *Merrill v. Southside Irr. Co.*, 112 Cal. 426, 44 Pac. 720. And a consumer whose land is situated within the flow of the distributing system of an irrigation company, "and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water in order that the distributor may supply later comers, even though a larger area, by reason of more favorable conditions, may thus be brought under cultivation": *Mandell v. San Diego Land etc. Co.*, 89 Fed. 205; *San Diego Land etc. Co. v. Sharp*, 97 Fed. 394. Under a contract conferring the right to a certain flow of water under a specified pressure, the usage and practice of the parties had given a practical interpretation of such contract to the effect that the flow could be accumulated for thirty days and the equivalent amount be delivered in full flow for forty-eight hours. Under this contract it was held that a consumer was, after demand, entitled to have delivered to him his accumulated flow of water, and the right to a delivery in this manner could be enforced by mandamus: *Hewitt v. San Jacinto etc. Irr. Dist.*, 124 Cal. 186, 56 Pac. 893.

For a failure to supply water to which a consumer is entitled, an irrigation company is liable for any damage which results from such default: *Hewitt v. San Jacinto etc. Irr. Dist.*, 124 Cal. 186, 56 Pac. 893. If the consumer is deprived of his water by reason of great scarcity, and the evidence shows that there was not sufficient water to reach his land if it had been turned on, he cannot recover damages: *Mack v. Jackson*, 9 Colo. 536, 13 Pac. 542. And if the consumer could have obtained sufficient water from another source, he cannot recover in damages a sum greater than he would have had to expend to obtain water from such source: *Mack v. Jackson*,

9 Colo. 536, 13 Pac. 542. An irrigation company cannot be liable for a failure to supply water until after a demand for water has been made. Whatever damage is suffered from lack of water prior to the date of such demand is not caused by the fault of the irrigation company, and nothing can be recovered therefor: *Western Irr. etc. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. 1098. In a suit to recover damages for a failure to supply water, the measure of damages will include the time, labor, and material expended in planting the crop: *Lutcher v. Stoddard (Tex.)*, 56 S. W. 608. The rental value of the land is not to be taken as the measure of damages, except when the consequent loss of crops was entire: *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423. When, however, the rental value of the land is a correct basis for estimating damages, there must be deducted from the rental value the necessary outlay which the plaintiff would have been required to make in the cultivation of the land: *Northern Colorado Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423. And while the loss of trees, seed, and labor, occasioned by a failure to furnish water for irrigation may constitute proper elements of damage in an action to recover for such failure, compensation for permanent improvements or for depreciation in the value of livestock and farm implements, such depreciation being due to their use in preparing and planting the ground, cannot be recovered: *Northern Colorado Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. 423.

An irrigation company is not liable for a failure to supply water where there is an insufficient supply of water due to the inadequacy of the fall of rain from which source the company's canal was to be supplied: *Landers v. Garland Canal Co.*, 52 La. Ann. 1465, 27 South. 727. But an expected deprivation of the supply of water is no defense to a mandamus proceeding to compel an irrigation company to furnish water to the plaintiff from its present supply: *Merrill v. Southside Irr. Co.*, 112 Cal. 426, 44 Pac. 720. Neither is it a sufficient defense to allege that there is not sufficient water to supply all the lands that lie under the flow of the company's ditch that need water for irrigation, in the absence of an averment that others have demanded or purchased water: *Merrill v. Southside Irr. Co.*, 112 Cal. 426, 44 Pac. 720. To exonerate an irrigation company for its failure to furnish water due to an insufficient supply, the failure must be chargeable to vis major, and not to negligence and inattention. Hence, if a company, by the employment of proper measures to utilize the water that is in a stream, might have prevented a failure of its water supply, it is not relieved from liability for damages by the mere fact of a scarcity of water in the stream from which its ditch is supplied: *Pawnee etc. Canal Co. v. Jenkins*, 1 Colo. App. 425, 29 Pac. 381. An injunction at the suit of a private litigant is not a prevention by operation of law, nor by an irresistible superhuman cause, and is not a legal excuse for the nonperformance of a contract. Hence, a water company is liable in an

action for damages for the breach of its contract to furnish water as agreed, where the company's ditches are completed beyond the point where the water is to be delivered, and in the exercise of due diligence the company could have delivered the water, and it is no defense that, at the suit of another corporation, the defendant has been enjoined from diverting sufficient water to comply with its contract, and that such injunction is still pending: *Sample v. Fresno Flume etc. Co.*, 129 Cal. 222, 61 Pac. 1085. A contract to deliver water "at all proper and seasonable times for the irrigation" of certain land is broken by a failure to deliver water at any season of the year, although the land was not cleared, plowed, or in any manner improved so as to be ready for irrigation, such preparation of the land not being a condition precedent to the company's obligation to furnish water. In such a case the irrigation company is liable in an action to rescind the contract and to recover the consideration money paid: *Richter v. Union Land etc. Co.*, 129 Cal. 367, 62 Pac. 39.

Liability for Negligent Care of Ditch.—An irrigation company may be rendered liable for an injury due to the negligent construction or maintenance of its ditches: *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. 329; *Kearney Canal etc. Co. v. Akeyson*, 45 Neb. 635, 63 N. W. 921; *Jenkins v. Hooper Irr. Co.*, 13 Utah, 100, 44 Pac. 829; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1000. Such companies can be held liable, however, only where they are negligent. They are in no sense insurers, and cannot be held liable for injuries due to the breaking of an irrigating ditch in the absence of negligence: *King v. Miles City Irr. Ditch Co.*, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431. A ditch is not a nuisance per se where it exists by lawful authority, even if its location happens to be in a street, and the company is not liable for damages due to the mere existence of such ditch and nothing more: *Platte etc. Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515; *Walley v. Platte etc. Ditch Co.*, 15 Colo. 579, 26 Pac. 129; *Fresno v. Fresno Canal etc. Co.*, 98 Cal. 179, 32 Pac. 943. There must be some special damage suffered by a party before he can maintain an action against an irrigation company for maintaining its ditch in a public street: *Walley v. Platte etc. Ditch Co.*, 15 Colo. 579, 26 Pac. 129.

Negligence, as we have said, is usually the only ground upon which irrigation companies can be held liable for the construction and maintenance of their ditches. Thus, if the accumulation of sand in a ditch is such as to render it probable that the periodical overflow would wash out the sand and damage the plaintiff, the irrigation company must use all the means which an ordinarily prudent man could employ to prevent it, and a failure to do so will amount to actionable negligence: *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197. A ditch company is liable for the damage which results from the overflowing of its ditch, where it recklessly attempted to

convey a volume of water far beyond the reasonable capacity of the ditch, and in so doing knowingly caused the ditch to overflow its banks and cause the injury complained of: Greeley Irr. Co. v. House, 14 Colo. 540, 24 Pac. 329. A canal company whose surplus ditch is inadequate and is improperly maintained is liable in damages to one who is injured by escaping water: Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009. And a canal company, which by its ditch and embankments so obstructs and dams up the channel of a small creek that water which usually escapes through such creek is backed up upon the plaintiff's land causing much damage, is liable for such injury. The fact that the defendant's canal was built before the plaintiff's buildings were erected gives it no greater right to bank up water to the plaintiff's injury: Arave v. Idaho Canal Co. (Idaho), 48 Pac. 1024. A ditch company, with a right to maintain its ditch over the lands of another, is liable to such land owner for injury to his stock which fell into a dangerous washout because of the company's failure to guard it, though the right to maintain the ditch over the land was acquired while it was still public land: Big Goose etc. Ditch Co. v. Morrow, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955. A party cannot gain a prescriptive right to be negligent; hence, the fact that a ditch company has maintained its ditch in the same negligent manner for several years gives no right to continue to use it negligently to the injury of another: Jenkins v. Hooper Irr. Co., 13 Utah, 100, 44 Pac. 829.

Canal companies attempting to control and use water are only required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature. As was said in Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009: "They are not required to prepare to meet unlooked for and overwhelming displays of adverse power—such as storms of such unusual violence as to surprise cautious and reasonable men." Hence, a ditch company is not liable for damage caused by an overflow of its ditch, where the proximate cause of the overflow was an unprecedented storm such as had never been known in the vicinity, and where the company's negligence in no manner concurred in or contributed to the cause of the injury: Grand Valley Irr. Co. v. Pitzer, 14 Colo. App. 123, 59 Pac. 420. The injury caused must not have been due to the contributory negligence of the plaintiff. But the injury for which suit is brought must be clearly participated in by the plaintiff in order to bar an action. Hence, where a plaintiff himself, by his method of irrigation, caused surface water to accumulate on his low land, he can nevertheless recover from an irrigation company for discharging quantities of water on his land and thus increasing his damage: Emison v. Owyhee Ditch Co., 37 Or. 577, 62 Pac. 13. There is a general rule that a plaintiff must not allow his damage to increase if he can prevent it. This was attempted to be applied in a case against an irriga-

tion company to recover for damages caused by leakage from the company's ditch, the company interposing as a defense that the plaintiff was under a legal obligation to dig a ditch on his own premises, and thus conduct the seepage from his lands. The court refused to recognize the defense, holding that the rule could not be extended to cover such a situation, and said: "We understand the rule to be that where one person suffers injury by the carelessness of another, occurring unexpectedly, and in a transitory manner, the one so suffering must go to some trouble to avoid or lessen the damage, if a temporary expedient or slight expense will do so; but if one whose carelessness or negligence causes a continuing injury to another, having knowledge of the evil and the cause of it, deliberately stands by, having an equal opportunity to prevent the damage as the one suffering it, and permits it to continue without an attempt to prevent it, he cannot avoid his responsibility by showing that the one injured might have avoided the damage by slight expense": *McCarty v. Boise City Canal Co.*, 2 Idaho, 225, 10 Pac. 623.

Liability of Irrigation Company to Riparian Owner.—In the arid states of the west where riparian rights are recognized and protected, an irrigation company cannot appropriate the waters of a stream to the detriment of riparian owners. While the right of such companies to appropriate the waters of streams is fully recognized both by statutes and by the decisions of the courts, such right cannot be used to defeat the rights of riparian owners. As was held in *Alta Land etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645, the rights of riparian proprietors are recognized as being an appurtenance to the land, running with it, as a corporeal hereditament, and cannot be extinguished by an appropriation under the statute. The ruling in *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 89 Pac. 762, is similar. The legislature cannot destroy or impair the vested rights of a riparian proprietor by conferring special privileges on an irrigation company without providing for the payment of a just compensation. An irrigation company cannot by simple appropriation acquire a right to the waters of a stream to which riparian owners are entitled, though it may acquire such right by gift, purchase, or condemnation: *Mud Creek Irr. etc. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078. For a diversion of the waters of a stream to his injury, a riparian owner may have redress both by injunction and by a suit for damages: *Heinlen v. Fresno Canal etc. Co.*, 68 Cal. 35, 8 Pac. 513; *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762. And an irrigation company which turns its water into the channel of a natural stream, can at a lower point in such stream take out no more water than it has put in, and riparian owners may enjoin the diversion of any greater quantity of water: *Palge v. Rocky Ford Canal etc. Co.*, 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875. An irrigation company may, however, acquire the right to take water as against riparian owners, by prescription: *Heinlen v. Fresno Canal etc. Co.*, 68 Cal. 35, 8 Pac. 513; *Mud Creek*

Irr. etc. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078; *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 508, 14 Pac. 379; *Cox v. Clough*, 70 Cal. 845, 11 Pac. 732. Indeed, an irrigation company or any other appropriator cannot acquire a right to any of the waters of a stream to the prejudice of a riparian owner, by any use, except under the statute of limitations: *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 30 Pac. 762; *Alta Land etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

It is only when an appropriation is made of water flowing over public land that riparian owners, who subsequently acquire interests in the land, have no rights in the water previously appropriated which can be enforced against an appropriating water company. "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow ut currere solebat, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect": *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. Rep. 350. This is undoubtedly the correct rule where riparian rights are recognized at all, and an irrigation company cannot by mere appropriation acquire the right to use water to the detriment of riparian owners whose rights have been acquired prior to the appropriation by the company. It would seem, however, that in Colorado riparian rights are not recognized. The statutes ignore such common-law rights, and the decisions apparently deny their existence: See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258, 19 Pac. 466.

BLORE v. BOARD OF CHOSEN FREEHOLDERS OF UNION COUNTY.

[64 N. J. L. 202, 45 Atl. 633.]

PUBLIC OFFICERS—FORCIBLE RETENTION OF OFFICE—RIGHT TO SALARY.—One who forcibly and without legal title retains possession of a public office after his term expires, against the demand of his legally appointed successor, cannot recover from the public the salary attached to the office accruing during such illegal possession.

William R. Codington and Craig A. Marsh, for the plaintiff in error.

Sherrerd Depue, for the defendant in error.

²⁴² DIXON, J. In January, 1893, the board of chosen freeholders of Union county appointed the plaintiff as warden of the Union county jail for the term of five years, commencing February 1, 1893. The appointment was made under the act of March 23, 1887 (Gen. Stats., 1831), which declares that the warden shall hold office for the term of five years and until his successor shall be appointed and qualified. The plaintiff accordingly assumed the office on February 1, 1893. On February 3, 1898, the board appointed Charles ²⁴³ Dodd as warden of the jail for the term of five years from February 15, 1898, and on the day last named Dodd, having duly qualified, went to the jail and demanded from the plaintiff possession of the office, but the plaintiff refused to surrender it, keeping the door of the jail locked to prevent Dodd's entrance. The ground of plaintiff's refusal was that, he being an honorably discharged Union soldier, his legal tenure continued, by force of the Veteran act of March 31, 1897 (Pamphlet Laws, 142), until he was removed for incompetency or misconduct. On this contention he retained possession of the office until June 21, 1898, when he was ousted by a judgment in quo warranto proceedings instituted by Dodd.

The present suit was brought to recover the salary of the office for the period between February 15, 1898, and June 21, 1898, and at the trial in the Union circuit a verdict therefor was directed. The legality of that direction is the subject now to be considered.

The general rule of the common law as administered in England was, that a person entitled *de jure* to an office, and not the merely *de facto* incumbent of the office, had a legal right to the official emoluments: *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983. An exception to this rule was established in New Jersey by the decision of this court in *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, where it was held that a person who had a *prima facie* legal title to an office, which cast upon him a public duty to assume the office and discharge its functions, until by further legal proceedings his apparent title had been overthrown, and who in pursuance of that duty discharged the functions of the office, thereby acquired an indefeasible right to the salary and fees accruing while he was in possession of the office. In *Erwin v. Jersey City*, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 734, this court laid down what may, perhaps, be deemed a further modification of the English rule, to this effect, that

when the incumbent of an office, lawfully holding over after the expiration of his stated term until his successor is appointed, surrenders the office to one who with color of title ²⁶⁴ claims to have been legally appointed the successor, and the latter thereupon enters and discharges the functions of the office, he acquires, as against the public and the prior incumbent, an indefeasible right to the salary and fees accruing during his possession.

Neither of these decisions affords any support to the present plaintiff.

It is conceded by his counsel that, on the facts stated in the beginning of this opinion, all of which were known to the plaintiff, and on the correct interpretation of the Veteran act mentioned (*Hardy v. Orange*, 61 N. J. L. 620, 42 Atl. 581), he had no title to the office after February 15, 1898. There was no trace of a public duty resting upon him to retain the office. His motive for doing so was purely private—for his personal benefit. So far from acquiescing in his tenure, the *de jure* officer was demanding possession of the office, and the plaintiff was by force resisting his demand. The case comes more nearly within the doctrine announced by the supreme court in *Meehan v. Freeholders of Hudson*, 46 N. J. L. 276, 50 Am. Rep. 421, cited approvingly by this court in *Erwin v. Jersey City*, 60 N. J. L. 149, 64 Am. St. Rep. 584, 37 Atl. 734, that one who intrudes into a public office by force or fraud and without legal title cannot recover from the public the salary attached to the office. The only distinction between that case and this is the distinction between a forcible and illegal intrusion and a forcible and illegal retention. Such a distinction ought not to lead to any difference in the result.

Our conclusion is that the plaintiff had no right to the salary accruing after February 15, 1898, and therefore there was error in the direction given by the learned judge at the trial.

Let the judgment be reversed.

SALARY OF OFFICER.—ONE GETTING POSSESSION of a public office forcibly and without authority cannot recover the salary thereof from the public: *Meehan v. Hudson*, 46 N. J. L. 276, 50 Am. Rep. 421. See, also, *Scott v. Crump*, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1.

BAGEARD v. CONSOLIDATED TRACTION COMPANY.

[64 N. J. L. 316, 45 Atl. 620.]

NEGLIGENCE OF RAILROAD EMPLOYEES—PROOF—NONSUIT.—In an action against a railroad company for negligence, where the plaintiff's case rests solely on the failure of the defendant's servants to take him beyond the tracks in the defendant's station, the defendant is entitled to a nonsuit, where the evidence shows that the plaintiff was taken beyond the defendant's premises to a safe place, there being nothing in his condition to indicate that it was unsafe to leave him alone, and he turned and re-entered the station and was injured twenty minutes later on a track that did not lie within his course, since there is no causal connection between the alleged negligence and the accident.

TRIAL.—EVIDENCE AT FORMER TRIAL—DISCREDITING PLAINTIFF.—Where a plaintiff testifies to an entirely different state of facts from that testified to at a former trial, the defendant, on a challenge of the good faith of the plaintiff's claim, may prove that at the former trial the plaintiff produced a witness to corroborate his story, such evidence not being received as proof of what was deposed, but to discredit the plaintiff.

EVIDENCE—STATEMENTS OF WITNESS AT FORMER TRIAL.—Affidavits or statements of third persons used by a party are evidence against him in a subsequent controversy. They stand on the ground of admissions.

CONTRIBUTORY NEGLIGENCE OF DRUNKEN MAN.—Where one, by reason of his own voluntary intoxication, exposes himself to danger, and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries.

James B. Vredenburg, for the plaintiff in error.

George H. Bruce, for the defendant in error.

317 COLLINS, J. Exceptions to the refusal of the trial judge to nonsuit the plaintiff or direct a verdict for the defendant involve an examination of the evidence in the cause.

The plaintiff was injured on June 12, 1897, in the terminal station of the defendant's electric street railway at the foot of Exchange Place, in Jersey City, near the ferry to New York. This terminal station was thus arranged and used: Inbound cars ran east down York street on a single track and then into the station on four tracks diverging therefrom and curving to the north. In the station the four tracks were parallel with each other and ran northward to the south line of Exchange Place. Thence they converged, crossing the sidewalk and curving to the west until they merged in a single

outwardbound track in that street. The cars came to a ³¹⁸ stop a little south of the line of Exchange Place, and thence started forward on their outward trips. These terminal tracks were covered by a shed, open front and rear and supported at the sides by posts ten inches square. The company's offices adjoined this shed on the east, and Taylor's hotel adjoined it on the west. The space between Taylor's hotel and the westernmost track in the station was four feet and eight inches wide. Between the line of the posts and the line of a car on the track the distance was not more than two and a half feet. Passengers had no proper occasion to go within this space, the car exit and entrance being on the other side, but men sometimes did so for a purpose which, there, would be a nuisance. Farther down the station there was an offset in the wall and a door of entrance to the hotel. The plaintiff was a passenger on a car that ran into the station on the westernmost track at twenty-five minutes after 11 o'clock at night. His destination was the ferry to New York. He was asleep in the car, and after the other passengers had gone he was awakened by the conductor and motorman. He testified that he was sick; they testified that they supposed that he was under the influence of liquor. There was no proof that anything was said by or to him. He was helped to the ground on the east side of the car and led out to the front of the station. He called as witnesses the conductor and motorman who at the time of the trial were not in defendant's employ. The conductor testified that he led the plaintiff to the edge of the sidewalk, beyond the company's premises. The motorman testified that he saw the conductor leading the plaintiff along by the side of the car toward the street, but did not see how far he went. The plaintiff testified that he was taken beyond the car, but not to the street. How near to the sidewalk he was brought he could not say. He further testified that he knew nothing of what happened from the time he was left until he was injured, except that he was trying to get out of the station. The conductor admitted that on the trial of a suit brought for the same injury, in which there was a nonsuit, he had testified that he left the plaintiff five ³¹⁹ or six feet short of the sidewalk, but he said that his memory had been refreshed and his present statement was correct. The plaintiff did not repudiate the conductor as a witness, as he possibly might have done on the ground of sur-

prise, and, in view of his own uncertainty, it must be considered as proved that he was taken beyond the defendant's premises. It makes little difference, however, whether he was taken to the street or to within a few feet of it. At either point he was perfectly safe and his course to the ferry was open. He was able to walk and there was no proof that anything in his condition indicated that it was improper or unsafe to leave him at the front of the station, whatever may have been the exact spot where he was left.

The conductor testified that as his car left the station on its outward trip the plaintiff turned and went toward the back of the station. He was next seen, as far as the testimony shows, by a witness called in his behalf and by two called for the defendant, and was then standing between the hotel and a car on the westernmost track that was awaiting the starter's signal. Its schedule time to arrive was twenty minutes before 12 o'clock at night, and to leave was fifteen minutes before 12 o'clock at night. He was leaning against the hotel or one of the posts of the shed, and had been vomiting. His witness was the motorman of a car that had just come in behind the other and upon the same track. The car ahead started and as it did so the plaintiff slid down to the ground, and his feet went under the rear wheels and were crushed. No negligence is attributable to those in charge of that car, for they had no reason to look for anyone in the place where plaintiff stood, and none to the motorman of the car behind, for he was under no duty to give warning. Nor was there any apparent danger to the plaintiff. He was safe as long as he stood still, and his fall was not due to the car's starting, but to his own sick or drunken state.

The first count of the declaration, of course, had no support, and the case under the second count was rested solely on the failure to take the plaintiff "beyond the tracks" in ³²⁰ the company's station. If the plaintiff was able to walk and merely under the influence of liquor, he could ask no greater care than that due to sober passengers. If the proof warranted notice to the car conductor that the plaintiff was sick, although not helpless, then such extra care was demanded as the circumstances seemed to require. That would have been a jury question, but to justify submission of recovery for the plaintiff's injury, it must have appeared that the injury was proximately caused by neglect to exercise such care. For

example, had the plaintiff been injured, as in fact he claimed upon a former trial, in attempting immediately to cross the tracks that lay between where he was left and the ferry which was his destination, a jury might well have found that sufficient care toward a sick man had not been exercised and this although he may have been taken to the sidewalk, for even then he would have had to cross the tracks. But the proof showed that the plaintiff turned and re-entered the station, and that he was hurt some twenty minutes later on a track that did not lie within his course. Plainly, there was no causal connection between the alleged negligent omission and the accident to the plaintiff. There should have been nonsuit or a direction of verdict for the defendant.

As the case may be retried, attention should be called to two incidental errors in the rulings at the trial. One was with respect to the evidence on the trial of the former action. At that trial the plaintiff testified to an entirely different condition of affairs from that developed at the trial now under review. This was his testimony: "I alighted from the car after it stopped; I alighted and walked toward the ferry, and as I was walking up the hill and turned to go to the ferry, a car struck my right leg, threw me to the ground and ran over my foot." That he so testified the defendant was permitted to prove, but an offer to prove that at the former trial he produced a witness to corroborate his story was overruled against defendant's exception, on the ground that the evidence would be hearsay. Such exclusion was erroneous. The evidence was competent on a challenge of the bona fides ³²¹ of the plaintiff's claim. It could not be received as proof of what was deposed, but it might properly discredit the plaintiff. Of course, a party is not bound in one trial by the testimony of a witness produced by him upon a previous trial of the same issue. He may have been disappointed in such testimony. It may have been false or mistaken testimony. But where the point sought to be established is that the plaintiff had previously put forth a different claim, it is permissible to prove not only that he himself asserted it in testimony, but also that he procured others to support him. Affidavits or statements of third persons used by a party are evidence against him in a subsequent controversy. They stand on the ground of admissions: *Brickell v. Hulse*, 7 Ad. & E. 454; *Gardner v. Moulton*, 10 Ad. & E. 464; *Richards v. Morgan*, 4 Best & S.

641. There is, of course, a difference between such cases and that now in hand, but to the extent indicated there is like reason for the legality of the excluded evidence.

The other error was in the inadequate treatment in the charge of the subject of the plaintiff's alleged intoxication as constituting contributory negligence. The defendant requested the trial judge to instruct the jury that if the intoxication of the plaintiff contributed to the injury as a proximate cause thereof, he could not recover; and again, that if the jury should believe, from the testimony, that at the time of the accident the plaintiff was in a state of intoxication and that such state of intoxication placed him in such a condition that he was unable and failed to exercise that care and caution required of a sober man, and that by reason of such condition he was injured, then, and in such event, he could not recover. To these requests the sole response in the charge was this: "Therefore, I say to you that the company, in taking charge of that man, if he was in a condition that he could not take care of himself, owed him a duty to take him out to the street or out of a place of danger. Now, did they do that? If they did, then, if he, on account of being in an intoxicated condition or for any ³²² other reason, afterward went back upon the premises of the company and was injured, the company is not liable unless they injured him intentionally." This ruling in effect deprived the company of the defense of contributory negligence arising from intoxication. It was entitled to that defense, if lawful, whether the plaintiff was taken from or left upon its premises. If a drunken man is accepted as a passenger, the carrier should not leave him in a place of danger, but I know of no rule that requires the carrier to follow up the drunken man if left in a place of safety, though on the carrier's premises, and see that in his wanderings he does not get in danger. The question, however, is entirely apart from defendant's negligence. A well and sober man in the position of the plaintiff when he slid down beneath the car wheels could, with proper care, have avoided such an accident; in fact, he would have been not at all in danger. No matter how the plaintiff came to be in that position, if his sliding down was wholly or partly due to drunkenness and the rule contended for be law, there could be no recovery. That such is the legal rule is well established. In all that I have said upon this subject it must be understood that the drunkenness, to

constitute a defense, must have been voluntary on the plaintiff's part, and this, I understand, was assumed in the requests to charge. There was proof, sufficient to go to the jury, of such drunkenness and the requests were pertinent. Drunkenness alone, though voluntary, is not negligence. A drunken man may be careful. The true rule is that voluntary drunkenness does not relieve the drunken man from the degree of care required of a sober man in the same circumstances, and if his drunkenness renders him incapable of exercising such care, then it contributes to any injury thereby sustained and bars recovery for another's negligence. The text-writers who treat of contributory negligence all assert this doctrine. A great array of references will be found in the recent case of *Smith v. Norfolk etc. R. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, where the doctrine is declared and elaborately defended. The adjudged cases are collated in 7 *American and English Encyclopedia of Law*, second edition, 491. The best statement ³²³ of the doctrine I have found is that of Mr. Justice McBride in *Woods v. Board of Commrs.*, 128 Ind. 289, 291, 27 N. E. 611, as follows: "Where one, by reason of his own voluntary intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries." Another apposite judicial utterance is found in *Illinois Cent. R. R. Co. v. Cragin*, 71 Ill. 177, 181, where it is said that "a person who voluntarily uses intoxicating drinks until he has become physically helpless or his powers so far impaired that he is unable to exert the necessary effort to avoid danger, is guilty of negligence when he places himself in a position of danger, and so when he thus stupefies and deadens his intellectual powers so that he is unable to foresee and guard against danger." These words seem strikingly appropriate to the plaintiff's plight just previous to his injury if due to drink and not to sickness.

The judgment must be reversed and a venire de novo awarded.

CONTRIBUTORY NEGLIGENCE.—DRUNKENNESS does not exempt a person from the responsibility of contributory negligence: *Johnson v. Louisville etc. R. R. Co.*, 104 Ala. 241, 58 Am. St. Rep. 39, 16 South. 75. If one, by reason of intoxication, exposes himself to danger and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is

guilty of contributory negligence and cannot recover: See the monographic note to Louisville etc. R. R. Co. v. Johnson, 25 Am. St. Rep. 40.

INTOXICATED PASSENGER.—ON THE DUTY OF A RAILROAD COMPANY in expelling an intoxicated passenger from a train, see *Roseman v. Carolina Cent. R. R. Co.*, 112 N. C. 709, 34 Am. St. Rep. 524, 16 S. E. 706; *Haug v. Great Northern Ry. Co.*, 8 N. Dak. 23, 78 Am. St. Rep. 727, 77 N. W. 97.

ALBRIGHT v. CORTRIGHT.

[64 N. J. L. 330, 45 Atl. 634.]

EASEMENT—DEFINITION.—A profitable right in land cannot be an easement, since an easement is a privilege without profit.

CUSTOM MUST BE IMMEMORIAL.—A right in land cannot, in New Jersey, be acquired by common-law custom, since such a custom, as distinguished from a usage of trade, must be immemorial, which, in New Jersey, is impossible.

CUSTOM MUST BE LOCAL.—A right claimed by way of custom, and which is laid in the whole public, is bad because too comprehensive, for a common-law custom is local, having respect to the inhabitants of a particular place or district.

PRESCRIPTION—CUSTOM.—A PROFITABLE RIGHT in the land of another cannot be acquired by custom, but only by prescription.

PRESCRIPTION—RIGHTS ACQUIRED BY PUBLIC.—Prescription is a personal right belonging to one or a few persons by particular designation; hence one cannot claim, merely as one of the public, a profitable right in the land of another by prescription, since the public cannot prescribe.

FISHING—PRESCRIPTION—CUSTOM.—The right of the public to fish in nontidal waters which cover the land of another cannot be acquired by custom, however long the practice has continued, or by prescription. Therefore, one who fishes in such waters, though forbidden to do so by the owner of such land, cannot justify by the long-continued usage of the public.

FISHING—STREAM STOCKED BY STATE.—A member of the public, merely as such, has no right to enter the land of another in order to get at something which is devoted to the public. Hence, where the state has, for the benefit of the public, stocked with fish a nontidal stream which crosses the land of another, one has no right against the protest of the owner to cross such land for the purpose of fishing in the stream.

Martin Rosencrans, for the plaintiff in error.

Thomas M. Kays and Thomas Kays, for the defendant in error.

331 ADAMS, J. The declaration is in tort, and seeks damages from the defendant for breaking and entering the close

of the plaintiff, being a tract of land covered with water in Stillwater township, in Sussex county, known as Swartswood pond, and for fishing and catching fish therein, in disregard of a notice by the plaintiff not to trespass on his land, and especially not to fish in said pond.

The gist of the defense is found in the following extract from the fifth plea, upon which issue has been joined: "That the said Swartswood pond has been stocked with fish by the fish commissioners of the state of New Jersey for twenty-five years, and that the fish therein belong to the public, and that the public for sixty years last past have entered the said close ³³² and openly, adversely, continuously, uninterruptedly, and without molestation used the said close and waters of said Swartswood pond for the purpose of fishing for fish therein, and catching and taking fish therefrom, and that the defendant, as one of the public, has a right by prescription in and to the said close and the said Swartswood pond, and had at the time mentioned in the plaintiff's declaration a prescriptive right of profit in the said lands covered with water, and said Swartswood pond, being the same described in the plaintiff's declaration, and to fish into the said waters of said Swartswood pond, and to take, catch, and carry fish therefrom without any hindrance or molestation of the said plaintiff."

At the trial the plaintiff proved both possession and title by deed in himself, before and at the time of the acts complained of, and that the defendant had fished in said pond, though notified by the plaintiff not to do so. The defendant then offered to prove that the pond had been stocked by the state of New Jersey about twenty-five years before, and that the public had continuously fished there for sixty years, which offers were denied, and a verdict for six cents was directed and rendered for the plaintiff. The questions presented by the exceptions are whether one who fishes in nontidal water that covers land of another, though forbidden to do so by the owner of such land, can justify either by the long-continued usage of the public, or because the water has been stocked by the state of New Jersey. These defenses, though blended in the special plea, are logically distinct.

Leaving out of view certain relations that are plainly foreign to this case, it may be said that whatever right, provable by user, the defendant could have had in the plaintiff's land must have been by way of easement, custom or prescription. The right that the defendant asserted was not an easement,

which is a privilege without profit. Nor could he, as one of the public, acquire this profitable right by custom. In the first place, a common-law custom, as distinguished from a usage of trade, must be immemorial, and this, in New Jersey, is impossible: *Ackerman v. Shelp*, 8 N. J. L. 125; *Allen v. Stevens*, 29 N. J. L. 509; *Ocean Beach Assn. v. Brinley*, 34 N. J. Eq. 438. In the next place, the right claimed is too comprehensive to be good by way of custom. "Custom is unwritten law established by common consent and uniform practice from time immemorial, and is local, having respect to the inhabitants of a particular place or district": 2 Greenleaf on Evidence, sec. 248. This custom is laid in the whole public. A custom so general would be indistinguishable from the law itself, so that the question in such a case really is not whether the usage is customary, but whether it is lawful: *Fitch v. Rawling*, 2 H. Black. 393. Finally, a profitable right in land of another cannot be gained by custom, but only by prescription: *Cobb v. Davenport*, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718.

In view, no doubt, of these considerations, the special plea alleges "a prescriptive right" in the defendant to which he is entitled "as one of the public." This proposition is unsound, because it conflicts with the rule that the public cannot prescribe. A right that a man claims merely as one of the public does not lie in grant, and therefore not in prescription, which presupposes a lost grant, and so can embrace only things that are grantable. "A prescription," says Lord Coke, "always is alleged in the person": *Gateward's Case*, 6 Coke, 60b. "Prescription," says Sir William Blackstone, "is merely a personal usage: As that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege": 2 Blackstone's Commentaries, 262. Mr. Greenleaf says: "Prescription is a personal right, belonging to one or a few persons by particular designation—as, for example, the owners of a certain parcel of land": 2 Greenleaf on Evidence, sec. 248. To use a technical phrase, the claimant, in such a case, must prescribe in a *que estate*—that is, under or in the right of some other person or persons whose estate has come to him.

That a right to take profit from another's land cannot arise by custom was decided as early as *Gateward's Case*, 6 Coke, 60b. Lord Kenyon, in *Grimstead v. Marlowe*, 4 Term Rep. 717, said that the law had been so settled ever since the time of

Gateward's ³³⁴ case. This is still the law of England. In *Goodman v. Mayor of Saltash*, L. R. 7 App. Cas. 633, 648, Lord Cairns says: "I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit a prendre in alieno solo. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a profit a prendre in alieno solo, and indeed cannot be the grantee of either a several fishery or of any other kind of real property." Two recent cases are *Blount v. Layard*, reported in a note to L. R. 2 Ch. Div. 681 (1891), and *Smith v. Andrews* (1891), L. R. 2 Ch. Div. 678. In the case first mentioned, Lord Justice Bowen, speaking of a part of the Thames that is above the reach of the tide, said: "Although the public have been in the habit as long as we can recollect, and as long as our fathers can recollect, of fishing in the Thames, the public have no right to fish there—I mean, they have no right as members of the public to fish there. That is certain law. Of course, they may fish by the license of the lord or the owner of a particular part of the bed of the river, or they may fish by the indulgence or owing to the carelessness or good nature of the person who is entitled to the soil, but right to fish themselves as the public they have none."

The following extract is from the opinion by Mr. Justice North, in *Smith v. Andrews* (1891), L. R. 2 Ch. Div. 678: "The idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it, but so far as regards nontidal rivers this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it. Some few passages may be found in the books in which judges are reported to have said that subjects have a right to fish in navigable rivers, just as in the sea; but on investigation it always will be found that they are referring to navigable rivers where the tide ebbs and flows and nothing else. . . .
³³⁵ But even if the public had in fact fished in this water with less interference or interruption than was actually the case, it would not supply any defense to the defendant in the present action. Any acquisition of right arising from long-continued use must be founded upon either custom, prescription, or lost grant. It is well settled that the public cannot have any right

to fish founded upon custom, however long the practice has continued. Upon this point it is not necessary to refer to various well known and often cited authorities. . . . Then can any such right be acquired by prescription? It is clear settled law that it cannot. . . . Lastly, as to any presumption of a lost grant, the observations of Mr. Justice Byles, in *Attorney General v. Mathias*, 4 Kay & J. 579, are conclusive. There can be no presumption of a lost grant with respect to matter which cannot be the subject of prescription." To the same effect is *Constable v. Nicholson*, 32 L. J. Com. P. 240, reported also with full notes in 8 Eng. R. C. 337. There are many American cases declaring the law to be as it is above stated, among which are *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333, *Pearshall v. Post*, 20 Wend. 111, 124, 125, and *Perley v. Langley*, 7 N. H. 233. The English law allows to the public no greater privileges in fresh-water ponds and lakes than in fresh-water rivers. This is evident from the cases collected in Gould on Waters, sections 79, 81.

The leading case in this state is *Cobb v. Davenport*, 32 N. J. L. 369, decided by the supreme court on facts much like those now before us. The plaintiff claimed to own a natural, non-tidal lake in Morris county called Green pond. The action was trespass for breaking his close and fishing in water that covered his land. The defendant pleaded the general issue denying that the plaintiff had an exclusive right to fish in said pond, set up the statute of limitations and license from the plaintiff and also alleged a prescriptive right to fish by virtue of certain grants to persons under whom the defendant claimed. A verdict was rendered for the defendant, which was set aside on rule to show cause. The supreme court held that the plaintiff had proved his title and that the defense, ³³⁶ by way of limitation, license, and prescription, was not sustained. Among the legal conclusions to be drawn from this case are these—that the soil under a fresh-water pond in New Jersey is not in the state, but is in private ownership; that the exclusive right of fishing therein is *prima facie* in the owner of the soil, but may be acquired separate from the ownership of the soil; that the right of the public to fish in private waters cannot be claimed by custom or established by proof of customary right, and that such right can be acquired only by grant or prescription and must be prescribed for in a *que estate*. The following extract from the opinion will show both how strong was the proof of user in that case, and how closely the facts resemble those now in view:

"The evidence in this case shows that the public in general, for a period of forty years and upward, were accustomed to fish in the pond in question without hindrance or molestation, and that permission to do so was neither asked nor granted; that the fishery was never used by its owners, either before or since the plaintiff acquired title, as a source of pecuniary profit, but that everyone, without regard to residence or tenure of lands, was permitted to fish in all parts of the pond at will and whenever his inclination prompted him to do so, and that this privilege was exercised under a prevalent impression that the fishery, in the language of one of the witnesses, was a free fishery. And it is a noticeable fact in the case that although the witnesses who fished in the pond testify that they did so under a conviction of their right, yet no one claimed a right personal to himself or other than such as it was thought belonged to the public in general. This evidence tends merely to establish a customary right in all the inhabitants and frequenters in that locality to fish in these waters, if a right to fish could be established by proof of custom. But the right of fishing being a profit a pendre in another's soil, as distinguished from an easement, cannot be claimed by custom, but must be prescribed for in a que estate. The defendant cannot justify under a custom, nor will proof of a custom sustain a plea of prescriptive right ³³⁷ because two rights, though they may coexist in the same land, are of a completely different nature."

The defendant subsequently applied for leave to file an additional plea justifying the alleged trespass on the ground that the fishery had become public by dedication. Leave was granted in order that the question might appear on the record, and the plea was then, after argument, struck out. The opinion is reported in *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718. The conclusions expressed by the court are that the right to fish and take fish in alieno solo is not an easement, but is a profit a prendre, and can be acquired only by grant or prescription, which must be pleaded; that such a right, so universal and unqualified as to subsist in the entire public, cannot be gained by custom or prescription, and that the doctrine of dedication to public uses does not embrace a claim of this character. The pleadings in the case now under consideration do not present the defense of dedication. The case of *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718, has been cited with approval by this court in *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 631, at page 639, and in *Attorney Gen-*

eral v. Paterson, decided at the present term, the exact point of the citation being, in each case, the tidal distinction between public and private waters.

It is plain from an examination of the authorities above referred to, and of many others that might be mentioned if it were worth while to multiply citations, that the supreme court, in *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718, declared and enforced the ancient and established law. There is nothing in our local conditions, which closely resemble those of England, or in the requirements of modern life that calls for the adoption of a different rule. It may be true that there is here, as there seems to be in England, a common misapprehension on this subject, and that a good deal of fishing that is thought to be of right is only permissive. But it is not desirable to change an important rule of law merely because it is sometimes misunderstood. In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, ³³⁸ catch fish, pick berries, and gather nuts in alieno solo, without strict right. Good-natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them. Little practical inconvenience results from this state of things, which the courts may well leave to regulate itself. Our conclusion on this branch of the case is that the trial judge did not err in excluding proof that the public had habitually fished in Swartwood pond.

The other ground of defense is that the state, some twenty-five years ago, stocked this pond with land-locked salmon, and that therefore the defendant, as one of the public, might fish in it. Inasmuch as evidence on this point was struck out, and the subsequent offer was not full, the facts relied on by the defendant do not appear as plainly as they otherwise might do. The waters of Swartwood pond, of course, escape and find their way to the ocean. It is not clear whether fish also may escape, or can enter from without, or even that salmon are now in the pond, or whether other kinds of fish are there. It is not distinctly shown that the defendant desired to catch salmon. He fished on two days and seems to have caught nothing. It is fair to assume, in favor of the defendant, that there were salmon in the pond, either placed there originally by the state of New Jersey or the successors of such; that they were desirable, and that the defendant would have been glad to catch them, and was at least attempting to do so. The fish thus introduced into this body of water must have been, at the dates

of the alleged trespasses, the property of the plaintiff, or of the state, or of the public, meaning by the latter phrase that the public were at liberty to catch them where they lawfully might. If these fish were the property of the plaintiff, the second defense fails. The defendant sometimes calls them the property of the state, and sometimes the property of the public. If they were the property of the state, this defense fails, and the defendant could no more take them than if they were still in the hatchery. The third alternative is that they were for the public, and this is probably what is meant when they are called the property ³³⁹ of the state. The question then is whether, on this branch of the case, the defendant can justify his acts by force either of common or statute law. He cannot do so by common law, for it is not true that a member of the community, merely as such, may enter the land of another in order to get at something that is devoted to the public. For example, highways and parks are devoted to the public, but one may not, therefore, cross another man's farm in order to reach them. Nor can the defendant prevail by virtue of the acts concerning fish and game, for the legislature cannot confer upon the public a general license to commit trespasses, and if it could do so no such intent will be implied, and the statutes do not express it.

The declared policy of the state of New Jersey is to promote and protect certain forms of animal life in the interest of sport and to increase the supply of food. To these ends nontidal waters have been stocked with fish, and woods and fields may be hereafter stocked with game. It may happen that gunners will then claim that they can cross lands against the protest of the owners, and will allege as their justification, in close analogy to this defense, that the birds which they seek were originally impressed by state authority with a special public character. No theory can be sound that would warrant such an invasion of private property in pursuit of private advantage. The trial judge did not err in overruling the second defense.

The plaintiff was entitled to the direction that the jury find a verdict in his favor for nominal damages. The judgment is affirmed.

THE RIGHT TO FISH AND TAKE FISH is not an easement, but a right of profit in lands, and cannot be claimed under the designation of easement: *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718.

THE RIGHT TO FISH IN AN UNNAVIGABLE STREAM is limited exclusively to the riparian owner or his tenant, unless another shows a right acquired in some way recognized by law:

Beach v. Morgan, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333. The right of fishing in private waters cannot be acquired by the public by a dedication: *Cobb v. Davenport*, 83 N. J. L. 223, 97 Am. Dec. 718.

STOCKING STREAMS WITH YOUNG FISH raised at the expense of the state, by the fish commissioner, does not operate as a license to the public for fishing in waters not public, nor in unnavigable streams on private lands: *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349.

SEBECK v. PLATTDEUTSCHE VOLKFEST VEREIN.

[64 N. J. L. 624, 46 Atl. 631.]

NEGLIGENCE—FIREWORKS—ON PRIVATE PROPERTY —LIABILITY OF OWNER—INDEPENDENT CONTRACTOR.—

The owner of a private park, who invites the public thereto to view an exhibition of fireworks, is not relieved from all responsibility for the safety of persons in attendance because the exhibition is given by an independent contractor, such owner being chargeable with the duty of using reasonable care to see that the premises are kept in a safe condition for the use of his guests, and in selecting, as the person to conduct the exhibition, one who is skilled in the manufacturing of fireworks and in conducting exhibitions thereof.

John I. Weller, for the plaintiff in error.

Charles L. Carrick and Rudolph F. Rabe, for the defendants in error.

624 GUMMERE, J. On August 21, 1898, the defendants held a festival at its Schuetzen Park, in Hudson county, to which the attendance of the public was invited, an admission fee of twenty-five cents being charged to each person who attended. Among other attractions, an exhibition of fireworks was given in the evening by one Gerhardt, a manufacturer of fireworks, under a contract with the defendant by which the providing of the fireworks and the conducting of the exhibition was left entirely in his hands. The plaintiff, who was present as a spectator, having paid the required admission fee, was watching this exhibition, and while he was doing so a bomb exploded in a sheet-iron mortar in which it had been placed for the purpose of throwing it into the air. The explosion caused 625 the mortar to burst, and one of the flying fragments struck the plaintiff in the neck, injuring him quite severely, and another struck him on the hand. At the time of the accident the plaintiff was standing in the middle of a crowd and about one hun-

dred feet away from the place where the bomb exploded. No rope or other barrier was stretched around that part of the grounds where the fireworks were being exploded, for the purpose of keeping the crowd back a safe distance, but the members of the defendant's amusement committee, in co-operation with the police who were upon the grounds, were stationed about or around the place for the purpose of keeping the crowd back.

The plaintiff, having sued to recover for the injuries received by him, was nonsuited by the trial court, and now seeks to have that judgment set aside.

The grounds upon which the nonsuit was directed were that the defendants were not liable because the exhibition of fireworks was not given by them, but by an independent contractor; and further, because, even if the defendants were chargeable with the duty of seeing that due care for the safety of spectators was used while the display was in progress, there was nothing in the evidence which would support the conclusion that they had not fully performed that duty.

We cannot yield to the view that the defendants were entirely relieved from responsibility for the safety of the persons in attendance upon its festival, because this exhibition was given by an independent contractor. Having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests; and if the exhibition, although given by an independent contractor, was of a character to jeopardize the safety of those who were present on the defendants' invitation, the duty was cast upon the latter of taking due precautions to guard against injury.

We, however, have been able to find nothing in the evidence which will justify the conclusion that the injuries of the plaintiff resulted from the failure of the defendants to properly perform any duty which it owed to him for his protection. The plaintiff insists that it was the duty of the defendants to have erected a barrier around the place where the fireworks were being set off, and that it was the failure to perform this duty which made the accident to the plaintiff possible. If by "a barrier" the plaintiff means an obstruction which would have prevented spectators from approaching dangerously near to the place where the fireworks were being set off, the erection of such a barrier at a distance of not less than thirty yards away would have amply discharged the defendants' duty in that regard, so far as anything in the case shows. But the absence of such

a barrier had nothing to do with the bringing about of the accident to the plaintiff, for, as has already been stated, he was more than thirty yards away from the exploding bomb at the time of his injury.

If, on the other hand, the plaintiff means by "a barrier" something which would have acted as a shield to protect spectators from danger resulting from the premature explosion of fireworks, or from their being sent off in the wrong direction, no such duty was cast upon the defendants. By erecting such a barrier they would have destroyed the very object of the exhibition, for a barrier of that kind, in order to afford perfect protection, would necessarily interfere with the view of those present of all fireworks which were not thrown into the air. Dangers which result to the spectators at an exhibition of the kind given by Gerhardt from the absence of such a safeguard must, in the very nature of things, be assumed by them.

That the premature explosion of the bomb in question resulted either from carelessness in its construction or in setting it off can fairly be presumed from the testimony; but for such carelessness the defendants are not responsible. Their duty in that regard was limited to the use of reasonable care in selecting, as the person with whom to make their contract, one who is skilled in the manufacturing of fireworks and conducting exhibitions thereof, and the evidence clearly shows that they fully discharged this duty in the selection of Gerhardt. ⁶²⁷ Assuming that the accident resulted from such carelessness as has been recited, the blame for it attaches, not to the defendants, but to Gerhardt.

The plaintiff contends that the discharge of fireworks at the defendants' park was in violation of section 2 of "An act to prevent the vending, burning, or exploding of firecrackers, squibs, turpentine balls, or fire serpents" (Gen. Stats., 1478), which makes it unlawful to burn, explode, or throw any of the articles enumerated. It is enough to say that, even if it be admitted that this statute prohibits the acts specified as well upon private property as upon public places (which is at least doubtful), the particular kind of firework which produced the plaintiff's injury is not embraced in, and its setting off is not prohibited by, the statute appealed to.

The judgment under review is affirmed.

NEGLIGENCE.—IF AN EXHIBITION is of a kind that probably will cause injury to spectators unless due precautions are taken to guard against harm, one who employs an independent contractor to

make and conduct it is not relieved from liability to persons receiving injury: *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323, 49 N. E. 913. On the liability for the negligence of independent contractors in general, see the monographic note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 382-428. On the liability of the keeper of public grounds and racecourses to spectators, see *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298, 41 N. E. 620.

CASES
IN THE
SUPREME COURT
OF
NORTH DAKOTA.

OSBORNE v. LINDSTROM.

[9 N. Dak. 1, 81 N. W. 72.]

STATUTES—RETROACTIVE EFFECT.—Generally speaking, statutes act prospectively only, and are not given retrospective effect, unless such was the clear legislative purpose.

STATUTE OF LIMITATIONS—RETROACTIVE EFFECT—ACTION ON JUDGMENTS.—Statutes of limitations apply to all cases thereafter brought, irrespective of when the cause of action arose, subject to the rule that they cannot be used to cut off causes of action without leaving reasonable time within which to assert them. Hence, a statute fixing the time within which actions must be brought applies to judgments rendered prior to its enactment, and it operates on prior causes of action not merely from the time of its enactment, but the time which has already run constitutes a part of the time prescribed by the statute.

JUDGMENT—CAUSE OF ACTION—LEAVE OF COURT.—A cause of action upon a judgment accrues when the judgment is rendered, and is complete without obtaining leave of court to sue thereon.

STATUTE OF LIMITATIONS—SUIT ON JUDGMENT—LEAVE OF COURT.—The commencement of an action upon a judgment is not stayed by order of court, so as to prevent the running of the statute of limitations, merely because during a certain period the judgment creditor is required to obtain leave of court in order to bring suit thereon.

STATUTE OF LIMITATIONS—FIXING TIME WITHIN WHICH EXISTING ACTIONS MAY BE BROUGHT.—Where a limitation period for bringing actions is shortened, the legislature must fix a time within which actions may be brought on existing causes of action, and while it need not fix an exact time, the time it does fix must be reasonable. When the legislature makes the time so short that the right to sue is practically denied, courts will declare such time unreasonable, but they cannot go further and fix a different time, neither can they, if the legislature fails to fix any time, supply this legislative lapse.

STATUTE OF LIMITATIONS—SUITS ON EXISTING ACTIONS—FIXING REASONABLE TIME.—A statute of limitations

with a provision that it shall not go into effect until a subsequent date is, in legal contemplation, a statute which takes effect at once, with a provision that suits may be brought upon existing causes of action until a specified subsequent date; and if the time between the passage of the act and its taking effect allows a reasonable period within which to bring actions, the statute is constitutional.

STATUTE OF LIMITATIONS—TIME WITHIN WHICH ACTIONS MUST BE BROUGHT—UNCERTAINTY AS AFFECTING REASONABLENESS.—The time within which suits must be brought on existing causes of action may be uncertain by reason of the happening of a subsequent event, yet the statute is valid if such event cannot happen until the expiration of a reasonable time.

Cochrane & Corliss, for the appellant.

Bangs & Guthrie, for the respondent.

* **BARTHOLOMEW, C. J.** This action was brought in April, 1897, upon a judgment rendered in 1883. The defendant answered, pleading the statute of limitations. To this answer a general demurrer was interposed, which was sustained, and, defendant electing to stand upon his answer, final judgment was rendered against him, from which he appeals, assigning error upon the ruling of the court upon the demurrer.

At the time of the rendition of the judgment upon which the action was based the period of limitation of actions upon judgments was twenty years: Code Civ. Proc. 1877, sec. 52. Such remained the law until the Revised Codes of 1895 went into effect, section 5200 of which reduced the limitation to ten years, and a subsequent section repealed the pre-existing limitation law. The Revised Codes were prepared pursuant to chapter 74 of the Laws of 1893, which created a commission for that purpose. That act prescribed the duties of such commission as to existing laws, and by section 4 provided that, as soon as practicable after the adjournment of the fourth legislative session (which would be the session of 1895), said commission should complete its labors by incorporating with the codes all the laws of that session, should consecutively number the sections, and index the whole, advertise for thirty days for bids for printing the same, and should superintend the printing of two thousand five hundred volumes thereof. Section 7 provided that these volumes should be delivered to the secretary of state, and that thereupon the governor should issue his proclamation announcing such fact, and accepting such codes, and that the same should go into effect thirty days after the date of such proclamation. The entire Code of Civil Procedure, as it stands in the Revised Codes, was passed as a single bill by the fourth

legislative assembly, and was approved March 2, 1895. The printed volumes of the Revised Codes were completed and delivered ⁵ to the secretary of state about December 1, 1895, and the governor issued his proclamation accepting the same, so that they went into effect on January 1, 1896.

It will thus be seen that the judgment upon which this action is based was rendered nearly twelve years before the new statute of limitations was enacted, and more than twelve years before it went into effect. It is the contention of respondent that the limitation law of 1895 applies only to causes arising thereafter, and not to pre-existing causes of action, or that, if it be held to apply to causes of action already in existence, as to the cause of action in this case it is unconstitutional, because it bars the cause of action without leaving a reasonable time within which to assert it. On the other hand, appellant claims that the amended law applies to causes of action already existing, as well as to causes thereafter arising, and that as to the cause of action in this particular case the act is constitutional, because respondent was bound to take notice of the passage of the act, and of its terms, and he had all the time from that date, to wit, March 2, 1895, until the act went into effect, on January 1, 1896, within which to bring his action upon the judgment, and that this was a reasonable time therefor. Some of the questions that necessarily arise in this case were involved in the case of *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 66 Am. St. Rep. 653, 75 N. W. 244, and some of them were there ruled. That case is much discussed by counsel in this case, and it is proper that we state some matters concerning that case that may not wholly appear from the opinion filed. The case arose under this same statute. The limitation of ten years had not run against the judgment there involved at the time of the enactment of the amended statute, nor at the time it took effect, nor until three and one-half months thereafter. We held that as to that judgment the law was constitutional, because there remained a reasonable time within which to assert that cause of action, and that no action could be maintained thereon after ten years. But that was not the chief contention in that case, nor the one to which the energies of counsel and the attention of the court were directed. In that case no attempt was made to bring an action on the judgment. Supplementary proceedings on execution had been instituted before the expiration of the ten years, and were pending when the bar of the statute fell. The chief contention was that such pro-

ceedings survived, notwithstanding the bar of the statute, and such was the first judgment of the court. But on further examination and additional arguments of counsel, we changed our views upon that point, and held that with the falling of the bar the judgment was extinguished, and with it died the supplementary proceedings. But, under these circumstances, the minor questions in the case were not, perhaps, as carefully considered as they would have been had they not been kept thus in partial eclipse. We held in that case that the amended law applied to existing causes of action, and with that holding we are well content. * At the same time we recognize all that counsel urge relative to statutory construction. Generally speaking, statutes act prospectively only, and are not given retrospective effect, unless such was the clear legislative purpose. True, this rule has sometimes been referred to in dealing with statutes of limitation, but never, we think, with entire accuracy, except where it has been sought to apply such a statute to a cause of action that had been asserted before the statute was enacted. That, of course, cannot be done. Ordinarily, statutes of limitation act very much like rules of evidence, which, in one sense, they are. They are to be applied to all cases thereafter brought, irrespective of when the cause of action arose, subject, of course, to the universally recognized rule that they cannot be used to cut off causes of action without leaving reasonable time within which to assert them. Our statute declares that "an action upon a judgment or decree of any court of the United States or of any court or territory within the United States" must be commenced within ten years after the cause of action accrued. That language admits of no exceptions. It covers judgments already rendered, just as certainly as it covers those to be rendered. As we have said, the former statute of limitations was in terms repealed. If we say the new act does not apply to causes of action upon judgments already rendered (and, if not to judgments, then to no other cause of action already accrued), then we have that great mass of causes of action without any limitation whatever, and this, confessedly, by reason of a statute that was intended to shorten the period of limitations. But it is perhaps useless to adduce arguments or cite authorities to show the legislative intent. Our statute determines that beyond cavil. Section 5149 of the Revised Codes reads: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy or for any other purpose has begun to run

before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code." That section can be given no force whatever, unless our statute of limitation were intended to apply to causes of action upon which the old statutes of limitation had commenced to run before the new went into effect. That section is also a complete answer to another argument made by respondent. To avoid the absurdity of leaving a large mass of causes of action without any limitation under the statute, counsel argue that the amended statute does apply to pre-existing causes of action, but as to such it operates only from the time it goes into effect, and that all such causes of action will stand unbarred for ten years from that time. In the case of *Sohn v. Waterson*, 17 Wall. 596, under a statute which barred absolutely all enumerated causes of action that had existed for the limitation period at the time of the approval of the act, and the wording of which the court declared implied that it covered existing as well ⁷ as future causes of action, the court, in order to avoid declaring the act unconstitutional as to causes of action that would be barred thereby, construed the legislative intent to be that the act should apply to existing causes of action, but as to them it should operate only from the date at which it went into effect. But we cannot accept this construction, because our statute in terms declares that, where the statute of limitations had begun to run on an existing cause of action, the period so run should be included as a part of the limitation term fixed by the amended statute.

But respondent contends that his cause of action is not barred for another reason. Section 5182 of the Revised Codes reads: "No action shall be commenced upon a judgment rendered in any court of this state between the same parties within nine years after its rendition without leave of the court for good cause shown and notice to the adverse party." Statutes of this character are very common, and their justice and necessity are too obvious for comment. But it is argued that no cause of action accrues until the right to sue becomes absolute, either by lapse of time or leave of court granted; that the judgment in this case was more than nine years old when suit was brought, hence no leave of court was necessary; but that ten years had not elapsed since the right to sue had become absolute by lapse of time, hence the action is not barred. The case of *Weiser v. McDowell*, 93 Iowa, 772, 61 N. W. 1094, supports that posi-

tion, not upon any authority whatever, but for certain specified reasons. There was a dissenting opinion in that case, the reasoning of which we much prefer. The legislature of Iowa immediately proceeded to declare that the statute should run from the date of the judgment: Code 1897, sec. 3439. Our statute provides that the action shall be brought within the specified time after the cause of action accrues. From the birth of the common law, a judgment has always been regarded as a cause of action. In the absence of restrictions, the owner might sue upon it at once and as often as he desired to harass a defendant. Leave of court cannot constitute a cause of action, neither can it aid a cause of action to accrue. A cause of action accrues when it exists, and a judgment exists from its rendition. A cause of action is complete on the judgment without leave of court. The statute says: "No action shall be commenced . . . between the same parties." It can be enforced by an assignee or personal representative of the judgment creditor: See *Carpenter v. Butler*, 29 Hun, 251, and cases there cited. Yet the nature of the claim—the cause of action—is in no manner changed by the assignment. Again, between the same parties, an action may be brought on the judgment without leave of court, and leave subsequently given *nunc pro tunc*: *Church v. Van Buren*, 55 How. Pr. 489; *Stoddard Mfg. Co. v. Mattice*, 10 S. Dak. 253, 72 N. W. 891. A cause of action cannot be created or caused to accrue *nunc pro tunc*. It is universal, unless saved by special statute, that, if suit be brought on a cause of action not yet ^s accrued, it must go down. We are clear that the cause of action accrued when the judgment was rendered.

But section 5215 of the Revised Codes declares: "When the commencement of an action is stayed by injunction or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action." This is the same as section 68 of the Code of Civil Procedure of 1877, and has long been the law in this jurisdiction. Respondent contends, as he could not sue upon the judgment until nine years after its rendition without leave of court, that, granting the cause of action accrued at the rendition of the judgment, yet the period of nine years must not be included in the limitation period, and hence his judgment is not barred. We think this position is unsound. The right to sue is not prohibited; it simply has a condition annexed to it—a condition that will always be removed when any

advantage can accrue to the creditor thereby. Actions against a receiver cannot be brought without leave of court, yet his appointment in no manner interferes with the running of the statute of limitations: *High on Receivers*, secs. 135, 184. Again, if the principle now contended for is sound, it has always been sound since that statute has been on our books. Prior to the adoption of the Revised Codes, the limitations on judgments, as we have seen, was twenty years; and by section 35 of the Code of Civil Procedure of 1877, no action could be brought upon a judgment without leave of court. If, then, respondent's contention be correct, the statute would not commence to run against the judgment during the entire twenty years, or at any time, unless this creditor saw proper to obtain leave to sue, and the bar would be complete only after the creditor had obtained leave to sue, and failed for twenty years thereafter to avail himself of it. No such result could ever have been within legislative contemplation. We hold unhesitatingly that the amended statute applies to the judgment in question, and by the terms of the statute such judgment was barred when this action was commenced.

There remains the important query, Is the statute constitutional as applied to this judgment? That it is not constitutional, if it did not leave reasonable time within which to assert rights under the judgment, is the unanimous voice of the authorities. The cause of action is property, and it cannot be summarily taken away. Turning again to the *Braithwaite* case, we there held that the time elapsing between the date of the passage and approval of an act and the date when it should go into effect must be considered in determining whether or not the legislature had allowed reasonable time within which to bring actions on pre-existing causes of action that would be barred by the terms of the act when it became effective. Since that case was decided the court of appeals of New York in *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753, has decided the same question directly opposite. Had that decision been reported prior to our decision of the *Braithwaite* case, perhaps our profound respect for that court might have induced us to reach a different conclusion, but we think not. Justice Gray, who speaks for the court of appeals, says that the point had not previously been decided in that state; and he cites *Smith v. Morrison*, 22 Pick. 430; *Stine v. Bennett*, 13 Minn. 153; *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *Eaton v. Supervisors*, 40 Wis. 668; *Hedger v. Rennaker*, 3 Met. (Ky.) 255; *Hart v. Bost-*

wick, 14 Fla. 180; Wrightman v. Boone Co., 82 Fed. 412, which he concedes holds adversely to the views announced in the decision. To these cases we would add State v. Jones, 21 Md. 432, Bigelow v. Bemis, 2 Allen, 496, Korn v. Browne, 64 Pa. St. 55, Clay v. Iseminger, 187 Pa. St. 108, 41 Atl. 38, Holcombe v. Tracy, 2 Minn. 241, and Peirce v. Tobey, 5 Met. 168, all of which are directly opposed to Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753. To support that case Price v. Hopkin, 13 Mich. 318, is cited. But that case was largely controlled by a provision in the Michigan constitution. Practically, the New York case stands alone, and under this condition of the authorities we are constrained to adhere to our ruling upon this point as announced in the Braithwaite case. We used language in that case, however, which, while not necessary to the decision of the case, needs qualification, and some that needs disapproval. We said: "While it is usual for the new limitation law, which cuts down the period within which certain actions may be brought, to provide in terms that all suitors whose causes of action have accrued before the change was made, should have, in any event, a specified time in which to sue, yet we do not think that this provision is essential to the validity of such a statutory change, when applied to existing causes of action, provided the time actually left in which to sue is not unreasonable." We shall hold in this case that the legislature need not fix an exact time, provided the time they do fix must, in any event, be a reasonable time; but so far as the language used in the Braithwaite case imports that the legislature need not fix any time, we think it misstates the law, and we do not wish to remain committed to it. Again, it is stated in the syllabi of that case—although the opinion does not fully bear it out—that, in the absence of a legislative provision fixing a time within which actions may be brought on existing causes of action, "the court will determine in each case whether, after the new law took effect, the suitor still had a reasonable time, under such new law, in which to commence his action." That language was wholly unnecessary in the case, and does not meet our approval. When the legislature, in fixing such time, makes it so short that the right to sue is practically denied, courts will declare such time unreasonable, and refuse to enforce the law. But courts cannot go further, and fix a time different from that fixed by the legislature within which suits may be brought, and if the legislature has failed to fix any time, the courts cannot, in a given case, supply this legislative lapse. The fixing of the time within which to

bring ¹⁰ suit, under such circumstances, is purely a legislative function. It is not within the power of the judiciary. We take this earliest opportunity to correct the errors that inadvertently found their way into the Braithwaite case.

We have said that the legislature must, in each instance, where a limitation period is shortened, fix a time within which actions may be brought on existing causes of action. In nearly all the cases heretofore cited under this head that was accomplished by passing the act shortening the limitation, with a provision in it that it should not go into effect until some subsequent date. The courts say that a party is bound to take notice of an act when it is passed. That proposition is fully conceded in *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. 753. The courts also say that passing an act with a provision that it shall not go into effect until a subsequent date is, in legal contemplation, equivalent to passing an act to take effect at once, with a provision that suits may be brought on existing causes of action until a specified subsequent date; and that if the time between the passage of the act and its taking effect gives a reasonable time within which to bring such action, the statute is constitutional, and will be upheld. The cases go upon the theory that in such cases it was the legislative purpose to fix the time between the passage of the act and the date of its going into effect as the time within which suits might be brought on existing causes of action. This reasoning seems to us entirely sound, and it infringes no constitutional right and works no injustice. But, in the application of this reasoning to the case before us, we are somewhat embarrassed by reason of the unusual circumstances attending the passage of the act here involved. As stated, the Code of Civil Procedure as it stands in the Revised Codes, and including this amendment to the prior limitation law, was passed by the fourth legislative assembly, and approved as one act, on March 2, 1895. From that date all persons must take notice of its passage and of its contents. But the act itself did not fix the time when it should go into effect, nor was that time fixed by the fourth legislative assembly. It was fixed by chapter 74 of the Laws of 1893, being the act which created a revising commission, with authority and directions to revise the whole body of our statutory law. It is urged that it cannot be said, with reason, that the legislature, in passing that act, had any intention of fixing a time within which actions might be brought upon existing causes of action, because in fixing the time at which the laws as revised should go into effect it had

other and more general purposes to subserve, and because it did not know and could not know that any change would be made in the existing limitation statutes. We recognize the difficulties. In no case that we have found have any such conditions been presented to a court. But we do not think the difficulties insurmountable, or such as take the case out of the operation of the principles already announced. While it is true that the legislature of 1893 could not certainly know that the legislature of 1895 would shorten the limitation ¹¹ period upon the recommendation of the revising commission or otherwise, yet it did know that the commission that it had created had full power to recommend such a measure, and that the legislature of 1895 would almost certainly pass it if recommended. It knew, too—for we must presume that it knew the law, and we must presume that it intended to act within the provisions of the constitution when it did so act—that in case the limitation period was shortened, a reasonable time must be given within which to bring actions upon existing causes of action. The fact that, in view of the magnitude of the project which it had inaugurated, that legislature may have had other reasons, and good reasons, for directing that the great volume of statutory law, revised as was contemplated, should not go into effect until some time subsequent to the enactment of such revision, is no legal argument to show that it did not act upon the particular reason here specified. We have no right to assume that it acted upon one good reason, to the exclusion of another good reason. Rather, we are bound to assume that it acted upon all good reasons, and intended to act upon all.

But, again, the legislature did not fix a specific time for the commencement of actions upon existing causes of action. It was limited by the happening of a subsequent event, the time of which was uncertain. It is urged that, as the legislature must fix a reasonable time, it necessarily follows that such time must be so specific and certain that parties can determine, when it is fixed, whether it be reasonable or not. We think that is correct, and we think this act meets this requirement. In other words, where the event that is to limit the time cannot happen until the expiration of a reasonable time, the statute meets the constitutional requirement as fully as if it selected a particular date as the earliest date upon which the event could happen, and declared that such date should limit the time. The practical difficulties that prevented the fixing of a date certain are very obvious. It was not desirable that the Revised Statutes

should go into effect and stand as proof of the laws until they had been printed and placed in the hands of those whose duty it was to enforce the law. But it was desirable that they should go into effect as soon as that was accomplished. The legislature could not say that they should go into effect in six months or a year after their passage, because the printed volumes might not be ready. If the time was fixed at two years, the printed volumes might be ready much before that time. The wisest course left to it was the course pursued.

Was the time thus limited necessarily a reasonable time? We must give the legislature credit for ordinary business knowledge, and the court must exercise the same in passing upon the question. The law required the commissioners, after the adjournment of the fourth legislative assembly, to incorporate all the laws passed by that assembly with the general body of the statute law, under the ¹² proper subjects and in the proper place. The whole was then to be consecutively numbered by sections, and an index prepared. The amount of work being thus determined, they were to advertise for thirty days for bids for printing the same. Thereafter contracts were to be entered into, and all the work incident to the publication and binding of the volumes performed. After their completion they were to be delivered to the secretary of state, and the governor would thereupon issue his proclamation accepting the same, and thirty days thereafter the laws should go into effect. It will be noticed that the law fixes two periods, of thirty days each, aside from the time that must be employed in preparing the matter and completing the volumes. As a matter of fact, it was ten months from the passage of the act until it went into effect. The members of the legislature, as men of ordinary business knowledge, knew that the law could not possibly go into effect, under the terms of the statute, within six months from the date of its passage. The fourth legislative assembly, that passed the amended limitation law, had no occasion to fix a time within which actions might be brought upon existing causes of action. That time had already been fixed by its predecessor. It placed the law within the operation of an existing statute, which fixed such time, and this was equivalent to direct action on its part. Much shorter periods have been upheld: *Stine v. Bennett*, 13 Minn. 153; *Bigelow v. Bemis*, 2 Allen, 496; *Smith v. Morrison*, 22 Pick. 430. We see no reason why we should not uphold this statute. There is no language in it that in any manner militates against our construction. If we place upon it a differ-

ent construction, we are forced to declare our limitation law unconstitutional as to existing causes of action that would be barred thereby. That result it is our duty to avoid, if a reasonable construction of the wording will permit. Hence we hold that chapter 74 of the Laws of 1893 fixed in advance a reasonable time within which actions might be brought on existing causes of action that would otherwise be absolutely barred by the terms of section 5200 of the Revised Codes. It follows that respondent's cause of action was barred under the allegations in the answer, and the demurrer to the answer was improperly sustained. The district court of Grand Forks county will set aside its judgment rendered in this case, and set aside the order sustaining the demurrer to the answer, and enter an order overruling the same.

Reversed.

-All concur.

LIMITATION OF ACTIONS.—A STATUTE CHANGING the period of limitation of actions applies only to prospective and not to antecedent transactions, unless the letter of the statute or its necessary and inevitable intent requires it: *Walker v. Burgess*, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99.

LIMITATION OF ACTIONS.—THE LEGISLATURE MAY SHORTEN the time for beginning actions, provided a reasonable time is given therefor: *Culbreth v. Downing*, 121 N. C. 205, 61 Am. St. Rep. 661, 28 S. E. 294; *Lawrence v. Louisville*, 96 Ky. 595, 49 Am. St. Rep. 309, 29 S. W. 450; *Relyea v. Tomahawk Paper etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412. It is not essential to the validity of a law shortening such period that it shall, as to existing causes of actions, fix a certain time after its enactment within which they must be enforced, if the time actually left in which to sue is not unreasonable: *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 66 Am. St. Rep. 653, 75 N. W. 244.

LIMITATION AGAINST A JUDGMENT BEGINS TO RUN upon the rendition thereof: *Note to Crim v. Kessing*, 23 Am. St. Rep. 498. But a judgment is considered as rendered only when it has been entered of record: *Callahan v. Votruha*, 104 Iowa, 672, 65 Am. St. Rep. 538, 74 N. W. 13; and until then the statute does not run against it: *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

PETERSON v. ST. ANTHONY AND DAKOTA ELEVATOR COMPANY.

[9 N. Dak. 55, 81 N. W. 59.]

CHATTEL MORTGAGES—WAIVER OF LIEN.—Where one holding a chattel mortgage authorizes the mortgagor to sell the property at private sale, and a sale is subsequently made, such facts operate as an implied waiver of the lien of the mortgage, whereby the mortgage is defeated and it is immaterial that one claiming to hold a prior mortgage also requested that the sale be made and that the proceeds were in fact paid to such prior mortgagee.

McCumber & Bogart and Wilson & Van Derlip, for the appellant.

W. E. Purcell, for the respondent.

⁵⁵ WALLIN, J. This action was brought to recover damages for the alleged conversion of certain wheat upon which plaintiff had a chattel mortgage. The trial in the district court was had without a jury, and judgment was entered in favor of the plaintiff. The defendant appealed from such judgment, and the action is now before this court for trial de novo.

On the trial it was stipulated that the mortgagor delivered at defendant's elevator at Stiles, North Dakota, one hundred and thirty-five bushels of wheat, worth sixty-five cents per bushel; and it is practically uncontroverted that the plaintiff bought the wheat of the mortgagor, and at his request paid one Kinney for such wheat; also, that the plaintiff had a chattel mortgage upon the wheat to secure a sum in excess of the judgment.

Appellant's counsel contend that the judgment should be reversed, ⁵⁶ and base their contention upon two grounds: 1. Upon the ground that it does not appear that before the action was brought there was a demand made for the wheat, followed by a refusal to deliver the same; 2. That it does affirmatively appear that there was a waiver by the plaintiff of the lien created by the mortgage, whereby the lien was destroyed, prior to the sale of the wheat to defendant. We shall have occasion in disposing of the case to consider only the point of waiver, and will be compelled to hold, under the evidence, that plaintiff did waive the lien of the mortgage. A perusal of the testimony given by plaintiff's witnesses discloses that plaintiff—the mortgagee—visited the premises where the grain was grown on the day the mortgagor finished threshing in the year in question, and on that occasion requested the mortgagor to pay the debt

secured by the mortgage. The mortgagor replied, in substance, that he would have to sell the wheat before he could get the money to pay with. To this plaintiff replied, in substance, that the mortgagor should go and get it. The mortgagor testified as follows: "Well, he didn't really tell me I should sell it. But I told him I would have to haul the wheat before I could get the money. Then he said I should get the money—he wanted the money." The testimony of the plaintiff is equally clear, and to the same effect. While on the stand the plaintiff was asked as follows: "Q. Did you ever tell him anything about it? A. I told him to haul the wheat and sell it, and then I sent the deputy sheriff out to take care of it." It appears that plaintiff gave the notes secured by the mortgage to the deputy sheriff for collection, but the testimony further shows that such officer did not take any action with respect to the matter; nor is it claimed that any attempt was ever made to take possession of the wheat under the mortgage for purposes of foreclosure or at all. The testimony we have adverted to comes from the plaintiff's witnesses, and the same is not disputed in any manner. It shows that the mortgagee saw fit to authorize the mortgagor to sell the property covered by the mortgage at private sale; and this authority was given under such circumstances as would, if acted upon, result not only in a removal of the property from the premises of the mortgagor, but likewise in mixing the same with other grain in one common mass, thereby rendering it impossible for the mortgagee thereafter to identify the property and take possession of it for purposes of foreclosure. These facts, in our judgment, must operate as an implied waiver of the lien of the mortgage. The case falls squarely within the case of *New England Mortgage etc. Co. v. Great Western Elevator Co.*, 6 N. Dak. 407, 71 N. W. 130. See, also, *Hogan v. Atlantic Elevator Co.*, 66 Minn. 344, 69 N. W. 1; *Partridge v. Minnesota etc. Elevator Co.*, 75 Minn. 496, 78 N. W. 85; *Roberts v. Crawford*, 54 N. H. 532. The further fact appears that the mortgagor, on the day following the interview with the plaintiff to which we have made reference, hauled the wheat in question to the elevator, and there sold it to the defendant, and, under the mortgagor's instructions so to do, the ⁵⁷ defendant paid the proceeds of the sale to one Kinney, who, it appears, claimed to have a prior mortgage on the wheat. The mortgagor testified that he "hauled it for Mr. Kinney," but on cross-examination said he did not see Kinney, except at the elevator. We regard this testimony,

however, as unimportant upon the question of waiver. The mortgagor was, in effect, authorized and requested by the mortgagee to haul the grain to market and sell the same, and bring the proceeds to the mortgagee. On the next day thereafter the grain was hauled and sold. Under these circumstances, we think the authority to sell, followed by an actual sale, cannot be defeated by a claim that some other person also requested the mortgagor to sell the same grain, and that the sale was made pursuant to the request of such other person. The fact of waiver or nonwaiver in a given case cannot be determined by the number of persons who may request a mortgagor to sell the mortgaged property. The crucial question is whether the plaintiff, holding a chattel mortgage, authorized the debtor to sell the property at private sale, and whether subsequently thereto such sale was actually made. Of course, a mere consent to a sale, not acted upon in any manner, would not operate as a waiver. Upon the ground of waiver alone, we hold that the judgment for plaintiff was erroneously entered, and must therefore be reversed. The trial court will reverse its judgment, and enter a judgment dismissing the action, with costs of both courts to defendant.

All the judges concurring.

CHATTEL MORTGAGE.—THE EFFECT OF A SALE of mortgaged personalty by the mortgagor, when authorized by the mortgagee, is considered in *Maler v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357. When, with the knowledge of the mortgagee, the mortgagor sells a part of the property, the mortgagee loses his lien as to what is sold but not as to that which remains unsold: *Barnet v. Fergus*, 51 Ill. 352, 99 Am. Dec. 547.

DOBLER v. STROBEL.

[9 N. Dak. 104, 81 N. W. 37.]

EXECUTORS AND ADMINISTRATORS—COLLATERAL ATTACK ON APPOINTMENT—ACCOUNTING.—An administrator who, pursuant to the order and authority of a probate court, takes the property of an estate which belongs to minor heirs, and misappropriates and dissipates the same, cannot escape an accounting on the ground that his appointment was a nullity.

L. T. Boucher, for the appellant.

A. W. Clyde, for the respondents.

¹⁰⁴ BARTHOLOMEW, C. J. The facts upon which the questions of law here involved rest are as follows: On November 24, 1897, Matthias Dobler died intestate in McIntosh county, in this state; that he left surviving him, and as his only heirs at law, two sons—Gottlieb Dobler, aged fourteen years, and David Dobler, aged ten years—the respondents herein. That on December 18, 1897, the petition of Jakob Dobler was presented to the county judge of said county, which petition set forth the death of said Matthias Dobler, and named the respondents as his children, and stated that petitioner was a brother of deceased, and that deceased left certain specified personal property and certain real estate, and asking the appointment of Gottlieb Strobel as administrator of said estate. Upon the same day the bond of Gottlieb Strobel, as such administrator, was filed and approved, and letters of administration were issued to him by the said county judge, and his oath of office filed, and appraisers were appointed and filed their oaths of office. Three days later, to wit, on December 21, 1897, an inventory and appraisal of the personal property was filed, and on the following day the administrator filed an application for leave to sell the personal property. The record is then silent until November 9, 1898, when A. W. Clyde filed in said county court an application to be appointed ¹⁰⁵ special guardian for Gottlieb and David Dobler, alleging that he was a friend of said minors, and that they had no general or special guardian, and that he desired to commence a special proceeding before said court against said administrator, as such special guardian, upon a petition, a copy of which was annexed to, and formed a part of, the application. The sufficiency of such petition is not questioned. After setting forth the appointment of said administrator in manner and time as before stated, and without any citations to or appearance upon the part of said minors, the petition continues: "That nevertheless said Gottlieb Strobel assumed the duties of administrator of said estate, and took possession of the property, and assumed to act as such administrator in the management and settlement of the estate, and in so doing has wrongfully misappropriated the personal property belonging to the deceased at the time of his death, the same being property exempt by law from the payment of his debts, which misappropriation he has made by omitting and neglecting to have the exempt personal property aforesaid appraised and set apart as such to the use and benefit of your petitioners, and by wrongfully selling and disposing of the same without authori-

ty of law or the order of the county court, and by wrongfully misapplying the same, or the proceeds thereof, to divers persons claiming or pretending to be creditors of said deceased." And the prayer of the petition is as follows: "Petitioners pray that said Gottlieb Strobel may be required to render a full account of all his doings as such administrator, and that his account may be fully settled by the court, and that thereupon his letters of administration may be revoked; that a successor may be appointed to complete the administration of the estate; and that he be ordered and directed to pay over to his successor all money and property for which he is justly accountable, as determined by the court, to the end that the rights of your petitioners may be duly observed; and for such other and further relief as may be just and proper." The application was granted when presented, and the special guardian was authorized to verify and file the petition; and upon the same day a citation was issued, to the administrator, returnable December 5, 1898, requiring him to appear and answer the petition. On the return day both parties appeared, and the administrator asked for further time, to enable him to employ an attorney and make answer. The time was allowed, and the hearing adjourned to December 10, 1898. Upon that day the administrator failed to appear, whereupon the petitioners by their special guardian, asked that he be adjudged in default for want of an appearance and answer, and that the court proceed with the hearing upon the petition. The court denied this request, and upon its own motion entered an order setting aside and canceling, and declaring null and void, all proceedings theretofore had in the matter of said estate, including the appointment of the administrator and the appointment of the special guardian. The court based its action upon the ground that its record and the petition of the minor ¹⁰⁶ heirs showed that the court never acquired jurisdiction to act in the matter. The petitioners appealed from such order to the district court, and in that court the order of the county court was reversed and set aside in toto. From the order of the district court the administrator appeals to this court.

The questions for decision upon these facts are simple: Was the action of the county court in appointing the administrator regular or irregular, or absolutely void? And, in taking possession of the estate, did the appellant act as an administrator de jure, or as administrator de facto, or as a bald trespasser? The learned district court appears to have entertained but little sympathy for the position of the administrator in this case.

We adopt the following language found in the opinion of that court: "The respondent was appointed administrator of this estate. He was duly commissioned by the court to take into his possession, all and singular, the property thereunto belonging. This he did, and did it under the mandate of the county court. On the face of the record it appears that most of the property was exempt to the two minor heirs. The petition of the special guardian asking for an accounting alleges under oath that the property of the estate has been willfully and unlawfully diverted from the purpose to which the law assigns it; that it has been disposed of without authority of law, and, unless protected by the court, the minor heirs will be defrauded of their just rights. If the position taken by the county court is correct, there has been no administrator, no bond, and no case in the county court; and even though all the property belonging ultimately to the minor heirs has been seized and disposed of, and this under the order of the county court, these same heirs are without remedy, except eventually in a personal action against the respondent, who, for aught that appears, is insolvent. To assume that such is the law is, in my opinion, a reproach upon the administration of justice. Helpless children cannot be juggled out of their rights by any such legal legerdemain. The county court seems to have confounded jurisdiction of the case; that is, of the property of the estate, the res, and jurisdiction of the persons interested. Section 6183 of the Revised Codes provides that the county court obtains jurisdiction of the case by the existence of certain facts, and the filing the petition setting forth such facts, and then provides how jurisdiction of the interested persons may be obtained. The distinction between jurisdiction of the subject matter and jurisdiction of the person is as clearly drawn in probate court as in any other. The original petition, while confessedly not artistically drawn, was clearly sufficient to give the county judge jurisdiction of the case. This being so, the proceedings in reference to appointment of an administrator, the property of the estate, etc., were not null and void. Doubtless, upon application of the heirs, the respondent would have been restrained from acting further, and removed, because of the irregularity of his appointment; but until such proceedings were had, respondent would continue to be in ¹⁰⁷ fact and in law administrator, and obliged to account when called upon." It will be conceded that the appointment of appellant was extremely irregular, and must have been set aside upon application of any party entitled to attack

it. Here it is the administrator himself who is seeking to sustain the order declaring the appointment void on the ground of want of jurisdiction in the court making the appointment. In the case of *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792, where the acts of an administrator were being attacked by interested parties on the ground that his appointment was void, the court said that the authorities were not agreed as to whether there might or might not be an administrator de facto. But the court also said that it could see no reason why there might not be an administrator de facto as well as a probate judge de facto. The point was not decided, but the court clearly inclined to the affirmative of the proposition. In *Succession of Dougart*, 30 La. Ann. 268, the court said: "As to the illegality of the appointment of the executrix, it is only necessary to say that the question cannot be raised in this indirect and collateral way. Whether legally or illegally done, she was appointed and qualified, and must be treated as the lawful executrix until her appointment is revoked in a direct action." In *Cloutier v. Lemee*, 33 La. Ann. 305, the court said: "Inquiries touching the legality of defendant's appointment are irrelevant. While actually exercising the office, he must perform its duties, and the illegality of his appointment will not vitiate his acts." In *Succession of Robertson*, 49 La. Ann. 80, 21 South. 197, the court cited the foregoing and many other authorities, and said: "Adhering to this line of authority, we are of opinion that the acts of the qualified and acting executrix must be recognized as valid, and that the subsequent nullity of her appointment would not vitiate them." All these were cases where parties interested in the estate were attacking appointments made by the probate court. In *Appeal of Ela*, 68 N. H. 35, 38 Atl. 501, which was a case where an administrator sought to avoid an accounting upon the ground that his appointment was a nullity, the court said: "Another consideration fatally adverse to the plaintiff is that a party cannot set up the invalidity of a decree under which he has obtained and holds property as a defense to an accounting for that property. It is useless to argue such a self-evident proposition. What is clearly apparent need not be proved." That meets the precise question here involved. To permit this appellant, who, on the record before us, and pursuant to the order and authority of the county court, has taken the property of this estate belonging to these minor heirs, and misappropriated and dissipated the same, to entirely escape an accounting on the ground that his

appointment was a nullity, would be such a manifest outrage upon justice that requires neither authority nor discussion to show that it cannot be done.

The order of the district court is in all things affirmed.

All concur.

When a Collateral Attack may and may not be Made on the Right of an Acting Administrator.*

Introduction.—Probate courts are courts of limited jurisdiction, but within the sphere of their jurisdiction their power is as ample as that of any court of general jurisdiction. Having such power, therefore, judgments and decrees of probate courts are entitled to the same presumptions and are as conclusive as the judgment of any other general court. Hence, probate decrees are not generally assailable in a collateral proceeding. While this rule is very generally recognized in this country at the present time, this has not always been true, especially during the early history of such courts. Consequently, there may be found, particularly among the earlier decisions, a conflict of judicial opinion respecting the conclusive character of the decrees of these courts. The reason for denying to the decrees of probate courts the same conclusiveness in a collateral proceeding as was accorded to the judgments and decrees of courts of general jurisdiction is to be found in two facts: 1. The forerunner and predecessor of probate courts, so far as English law is concerned, were the ecclesiastical courts, which were not recognized as courts in the common-law sense, and no presumption was indulged as to their jurisdiction, but such facts were required to appear upon the face of their proceedings, and the probate courts being modeled after the ecclesiastical courts the same rule was held to apply; and 2. The American probate courts being entirely creatures of statute, they were frequently classed as inferior courts with limited jurisdiction, and no presumption was indulged as to their jurisdiction. Without further elaboration it may be said that our present probate courts are not modeled after the ecclesiastical courts, but are courts of record, with large judicial powers, and that while their jurisdiction is limited, it is not inferior, but within the scope of their authority it is as great as that of any other court.

If probate courts, then, are entitled to the same presumptions as to the validity of their decrees as courts of general jurisdiction, when can a grant of letters of administration be collaterally attacked? As we shall subsequently see in detail, letters of administration can be assailed in a collateral proceeding only upon jurisdictional grounds. By this is not meant, however, that in a collateral proceeding, want of jurisdiction may in all cases be established by extraneous evidence. Indeed, as will be seen, this can seldom

*REFERENCE TO MONOGRAPHIC NOTE.

Validity of grant of administration, generally: 79 Am. Dec. 65-67.

be done, even though the court has erroneously found the requisite jurisdictional facts. We mean simply that, where an administrator is acting by virtue of an appointment from the probate court, his right to act can in a collateral proceeding be assailed upon no other ground than that the court had no jurisdiction over the matter of appointing him.

Jurisdictional Facts.—To make a grant of letters of administration valid two jurisdictional facts must exist: 1. The party must be dead; and 2. He must have resided in the county at the time of his death, or have left assets therein. Both of these facts must exist before letters of administration can be granted: *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *Van Glessen v. Bridgford*, 83 N. Y. 348; *Burnett v. Meadows*, 7 B. Mon. 277, 46 Am. Dec. 517. As to whether a recital that such facts exist is conclusive upon collateral attack, even if erroneous, will be subsequently discussed.

Record Shows no Jurisdiction.—There can be no question about letters of administration being subject to collateral attack where the record on its face affirmatively shows that the court acted without jurisdiction. Under such circumstances, the proceedings are a nullity and confer no right upon an administrator to act: *Moore v. Moore*, 33 Neb. 509, 50 N. W. 443; *Elgutter v. Missouri Pac. Ry. Co.*, 53 Neb. 748, 74 N. W. 255; *Murchison v. White*, 54 Tex. 78; *Gillett v. Needham*, 37 Mich. 143. Thus where the record shows that the deceased resided in a county other than that in which administration was granted, the grant of letters may be collaterally attacked in a suit by the administrator: *Moore v. Philbrick*, 32 Me. 102, 52 Am. Dec. 642. And where administration was on the estate of a decedent fifteen years after his death, in a county other than the one prescribed by statute, for the sole purpose of consuming the estate in costs, the letters were void and subject to collateral attack: *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789. The mere fact however, that the order appointing an administrator is defective will not render the appointment void on collateral attack, if the facts actually existed so as to make the appointment valid, for such facts may be shown upon collateral attack: *Peebles v. Watts*, 9 Dana, 102, 33 Am. Dec. 531.

Effect of Court Having Jurisdiction in Probate Matters.—It may be stated as a general rule that, where letters of administration are granted by a court having jurisdiction for such purpose, they cannot be collaterally impeached, but are conclusive unless drawn in question in a direct proceeding or upon appeal: *McGehee v. McCarley*, 91 Fed. 462; *Moreland v. Lawrence*, 23 Minn. 84; *Ferrell v. Grigsby* (Tenn.), 51 S. W. 114; *Murchison v. White*, 54 Tex. 78; *Bradley v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473; 71 N. W. 282; *Kelly v. West*, 80 N. Y. 139; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514; *Savage v. Benham*, 17 Ala. 110; *Johnson v. Kyser* (Ala.), 27 South. 784; *Boody v. Emerson*, 17 N.

H. 577; *Francisco v. Chicago etc. Ry. Co.*, 35 Fed. 647; *Winter v. London*, 99 Ala. 263, 12 South. 488; *Quidorts v. Pergeaux*, 18 N. J. Eq. 472; *Lawrence v. Lawrence*, 24 Mo. 265; *Duson v. Dupre*, 32 La. Ann. 896; *Bryan v. Walton*, 14 Ga. 185.

This conclusive presumption of the validity of letters of administration applies, however, only where the proceedings are regular on their face, for though a court might have adequate jurisdiction in a proper case, yet if the proceedings themselves showed an absence of the essential jurisdictional facts, the grant of letters is necessarily void, and, as has been seen, may be collaterally impeached. But if the proceedings are regular and the record itself asserts the jurisdictional facts, the presumption is conclusive, and no collateral attack may be made on the legality of an administrator's appointment: *Barclift v. Treece*, 77 Ala. 528; *Bradley v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 282; *Moore v. Moore*, 33 Neb. 509, 50 N. W. 443; *Brown v. Landon*, 30 Hun, 57; *O'Connor v. Huggins*, 113 N. Y. 511, 21 N. E. 184; *Lowman v. Elmira etc. R. R. Co.*, 85 Hun, 188; 32 N. Y. Supp. 579; *Epping etc. Co. v. Robinson*, 21 Fla. 36; *Wilson v. Imboden*, 8 La. Ann. 140; *Kling v. Connell*, 105 Ala. 500, 53 Am. St. Rep. 144, 17 South. 121.

In such a case, since the record of the appointment does not disclose the want of jurisdiction in the court, the existence of the jurisdictional facts must be conclusively presumed: *Bradley v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 282; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514. The validity of the appointment is thus tried by the recitals in the record itself and the presumptions arising therefrom: *Murchison v. White*, 54 Tex. 78. Hence, it is proper, in a collateral proceeding, to exclude an offer to show that an administrator was not lawfully appointed, where there is no offer to show that the appointment was made by an officer having no jurisdiction over such matters: *Sager v. Lindsey*, 118 Pa. St. 25, 13 Atl. 211. The order granting letters of administration is the exercise of jurisdiction, involving the adjudication of jurisdictional facts, and proof outside the record cannot be adduced to disprove the jurisdictional facts found by the court: *Epping etc. Co. v. Robinson*, 21 Fla. 36. As was said by the court in *Fisher v. Bassett*, 9 Leigh, 119, 83 Am. Dec. 227, a grant of administration cannot be questioned collaterally, in other actions, provided the court had jurisdiction of the cause. "And this is to be understood as having reference to jurisdiction over the subject matter; for though it may be that the facts do not give jurisdiction over the particular case, yet if the jurisdiction extends over that class of cases, the judgment cannot be questioned; for then the question of jurisdiction enters into, and becomes an essential part of, the judgment of the court. . . . Where the court has jurisdiction of cases ejusdem generis, its judgment, in any case, is not merely void; because its invalidity cannot appear without an inquiry into the facts,

an inquiry which the court itself must be presumed to have made, and which will not, therefore, be permitted to be reviewed collaterally."

Where the proceedings are regular on their face, it will be presumed that the probate court, before making an appointment of an administrator, ascertained the existence of the necessary jurisdictional facts: *Kling v. Connell*, 105 Ala. 590, 53 Am. St. Rep. 144, 17 South. 121; *Farley v. McConnell*, 7 Lana. 428. Where the proceedings recite that the necessary facts were alleged and proved, the determination of the court upon these facts, however erroneous, cannot be disturbed in a collateral proceeding: *O'Connor v. Huggins*, 113 N. Y. 511, 21 N. E. 184. The action of the court in appointing a special administrator will be presumed to be correct: *Masterson v. Brown*, 51 Iowa, 442, 1 N. W. 791. The adjudication of the court upon any jurisdictional matter is presumed to be correct, and is not generally assailable in a collateral proceeding: *Lees v. Wetmore*, 58 Iowa, 170, 12 N. W. 238.

In a suit by an administrator to recover assets of the estate, the court cannot generally inquire into the legality of his appointment: *Wilson v. Ireland*, 4 Md. 444; *Fishwick v. Sewell*, 4 Har. & J. 393; *Dunbar v. Thomas*, 14 La. 332; *Tucker v. Nebeker*, 2 App. Cas. D. C. 326; *Jackson v. Phillips*, 57 Neb. 139, 77 N. W. 683. On an appeal to test the validity of a will, the validity of an administrator's appointment cannot be inquired into, since this is a collateral attack: *Edelen v. Edelen*, 6 Md. 288. Where a probate court has determined that one is an executor of an estate by construction, the validity of such judgment cannot be collaterally impeached in a proceeding by a distributee to procure a grant of letters of administration to himself, and to revoke the letters already granted: *Grant v. Spann*, 34 Miss. 294. In a proceeding by an administrator to examine suspected persons relative to the fraudulent receiving, concealing, and conveying property of a decedent, the validity of the administrator's appointment cannot be attacked: *Dickey v. Taft*, 175 Mass. 4, 55 N. E. 313. A proceeding by an heir, who is in possession of the only property of the estate, to set aside letters of administration on the ground that there was no necessity for them, the property having been divided among the heirs without administration, is a collateral proceeding, in which the validity of the administrator's appointment cannot be attacked. The fact that the administrator in his petition erroneously stated that the heirs of the deceased were unknown does not affect the validity of the appointment in a collateral proceeding: *Estate of Strong*, 119 Cal. 663, 51 Pac. 1078.

Recital of Jurisdictional Facts.—The question has arisen whether the record should contain a recital of the necessary jurisdictional facts in order to render letters of administration invulnerable to collateral attack. Without doubt there are decisions, especially early

ones, in which it is stated that the jurisdiction of probate courts must affirmatively appear from their proceedings, otherwise their action is void and the appointment of an administrator may be collaterally questioned. As already pointed out in a different connection, this view probably arose from the fact that probate matters were in England cognizable by the ecclesiastical courts, and as to such courts it was required that their jurisdiction should affirmatively appear of record, and from the further fact that, probate courts being creatures of statute, their jurisdiction was limited and, as stated in some of the cases, inferior. Thus, in *Vick v. Vicksburg*, 1 How. (Miss.) 379, 31 Am. Dec. 167, it was said of probate courts that "the record must show the jurisdiction, or it does not exist. It is the general principle applicable to all inferior tribunals." In *Griffith v. Wright*, 18 Ga. 173, the record did not affirmatively show the place of residence of the decedent, and the court allowed the jurisdiction of the probate court to be attacked in a collateral proceeding. *Langworthy v. Baker*, 23 Ill. 484, is an early Illinois case, from the language of which it would appear that the record of a probate court must show the necessary jurisdictional facts to authorize a grant of letters of administration. The proceeding in this case, however, was not regarded as a collateral one, so that the doctrine of presumption to sustain jurisdiction was not applicable, and for this reason the case cannot be deemed an authority for the proposition that a grant of letters may be collaterally assailed unless the probate record contains a recital of jurisdictional facts.

At the present day there is no doubt that probate courts are regarded as courts of general and unlimited jurisdiction within the scope of their powers. Over probate matters their power is as extensive as that of any court of general jurisdiction. Hence, in a collateral proceeding, their acts and judgments should be favored with the same presumptions and be deemed as conclusive as the judgments of other courts of record; and this general rule that judgments of probate courts are entitled to the same intendments and presumptions as other general courts, and are as unassailable upon collateral attack, is widely recognized. But the rule seems not to go to the extent of sustaining probate decrees when there is an entire absence from the whole record of any statement as to jurisdictional facts. Thus in *Langworthy v. Baker*, 23 Ill. 484, while recognizing that presumptions in favor of the jurisdiction of probate courts are indulged, it was said that "the record need not show the existence of all the facts from which the jurisdiction appears. But those facts without which jurisdiction could not be entertained in the particular case should appear upon the record." The court, after stating the facts upon which jurisdiction depended, said: "Neither of these facts, and they are fundamental facts, are shown, and the question arises, Must this court presume they did exist? For it is a rule that intendments as liberal will be indulged in its

favor as would be to the proceedings of the circuit court. But this requirement of the statute goes to the very origin of the proceedings. It is the existence of these facts which awakens the power of the court—which calls it into action. They are fundamental facts, and although the court had cognizance of the general subject, it not appearing by the record that the facts were such as to give the court jurisdiction in the particular case, we are not authorized to presume their existence. The record purports to show all the facts on which the court assumed to act, and we cannot, therefore, intend other and indispensable facts existed. Had the court found the [several] facts to be, . . . we would presume there was evidence of the facts, but not being found in the record, we cannot presume they existed." It might appear from *Burke v. Mutch*, 66 Ala. 568, that the mere exercise by the probate court of its power to appoint an administrator is in itself sufficient to sustain the appointment in a collateral proceeding, it being presumed that the court previously ascertained the existence of the jurisdictional facts without which the power could not be legally exercised. The same rule is implied in *Burnett v. Nesmith*, 62 Ala. 261, where the court, in speaking of probate courts as administering a general, original, and unlimited jurisdiction, said: "Its sentences, therefore, as to the grant of administration, are, when collaterally assailed, protected by the presumption extended to the judgments and decrees of all courts of general jurisdiction. Whatever within the jurisdiction is done will be presumed rightful, until the contrary is shown. Facts which must have been ascertained by the court to exist, and upon the existence of which the regularity of its action depends, will be conclusively presumed to have been ascertained, unless the record affirmatively discloses the contrary": See, also, *Landford v. Dunklin*, 71 Ala. 594. But in the later case of *Barclift v. Treece*, 77 Ala. 528, the court seems to recognize that, at least as to certain jurisdictional facts, if the record is silent, the want of jurisdiction may be shown even in a collateral proceeding. And that it is only where the record discloses the jurisdictional facts that the presumption is conclusive.

No doubt there are certain facts which while in a sense may be said to be jurisdictional, yet they are conclusively presumed to exist in a collateral proceeding, though the record is silent regarding them. In the case just cited, *Burnett v. Nesmith*, 62 Ala. 261, where the sheriff had been appointed administrator, the statute permitted such an appointment only in case there was no general administrator and no other fit person who would administer, and the record did not disclose this state of facts required by the statute. But the court held this to be unnecessary, and, upon collateral attack, it would be conclusively presumed that the court found these facts to exist. Again, under the statutes of Alabama, a married woman could be appointed administratrix only with her husband's consent. But in *English v. McNair*, 34 Ala. 40, it was held that this fact need

not appear in the record, when the validity of the administration was collaterally assailed, for the husband's consent would be presumed. Of course, the evidence upon which the court acted need not be preserved in the record, it being conclusively presumed, in all collateral proceedings, that the court had sufficient evidence before it to justify its action: *Hobson v. Ewan*, 62 Ill. 146; *Heyward v. Williams*, 57 S. C. 35 S. E. 503. In Illinois it is provided by statute that one not a relative or creditor should not be appointed administrator before the expiration of seventy-five days from the date of the decedent's death. And in *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631, the record failed to show the date of the administrator's appointment, but the court said that it would be presumed that the appointment was not made until the time required by statute. In *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1088, where the record failed to show a vacancy at the time an administrator *de bonis non* was appointed, it was held that the mere appointment was of itself *prima facie* evidence of a vacancy in the administrator's office, and that such presumption would prevail in a collateral proceeding until clearly rebutted. It is, therefore, clear that there are cases in which the record is not required to disclose certain jurisdictional facts in order to render a grant of letters of administration invulnerable to collateral attack. By statute, the letters themselves may be made conclusive evidence in a collateral proceeding of the right of an administrator to act: *Johnson v. Kyser* (Ala.), 27 South. 784.

Generally speaking, there must be some record somewhere of the existence of certain jurisdictional facts, or the right of an administrator may be collaterally assailed. This does not mean, however, that the letters themselves or the order of the court must contain a recital of the essential jurisdictional facts. Usually, a petition is presented to the probate court, which contains a recital of the facts necessary to give the court jurisdiction in the particular case. And where a sufficient petition is presented to the proper court, and the court after a hearing upon such petition has appointed an administrator, the administrator's right to act cannot be assailed collaterally. The assertion of the requisite jurisdictional facts in a petition is in most states the only record required in order to make the appointment of an administrator unassailable to a collateral attack: *Sec Estate of Moore v. Moore*, 33 Neb. 509, 50 N. W. 443; *Haug v. Primeau*, 98 Mich. 91, 57 N. W. 25; *Morford v. Dieffenbacher*, 54 Mich. 593, 20 N. W. 600; *Bradley v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 282; *Fisher v. Bassett*, 9 Leigh, 119, 33 Am. Dec. 227; *Garrett v. Boeing*, 68 Fed. 51; *Walker v. Welker*, 55 Ill. App. 118; *Lewis v. Dutton*, 8 How. Pr. 99; *Monell v. Dennison*, 17 How. Pr. 422; *Warfield's Estate*, 22 Cal. 51, 83 Am. Dec. 49; *Irwin v. Scriber*, 18 Cal. 500; *Burdett v. Silsbee*, 15 Tex. 606.

Indeed, in some states a petition, on the face of which appears the necessary jurisdictional facts, is a condition precedent to the

appointment of an administrator, and a defective petition will render the subsequent appointment subject to collateral attack: *Haug v. Primeau*, 98 Mich. 91, 57 N. W. 25; *Shipman v. Butterfield*, 47 Mich. 487, 11 N. W. 283; *Moore v. Moore*, 33 Neb. 509, 50 N. W. 443.

It would appear, however, that the rule has been recognized that though the record is silent as to the fact of residence of the deceased, the question cannot be raised collaterally, since the court is one of general jurisdiction and every presumption is indulged in support of the decree of appointment: *Ames v. Williams*, 72 Miss. 760, 17 South. 762.

Collateral Attack Where Jurisdictional Facts Recited.—There are some cases in which the fact that a sufficient petition has been presented, or that the jurisdictional facts otherwise appear from the record, is not conclusive upon the right of an administrator to act for the estate, even in a collateral proceeding. In these cases an erroneous recital of some jurisdictional fact, such as that the testator is dead, may be contradicted, and the truth be proved collaterally. It would seem that where probate courts have been regarded as courts of limited and inferior jurisdiction, much greater liberty has been allowed in attacking their decrees. We shall consider separately the various situations in which it has been held that a grant of letters of administration could or could not be attacked in a collateral proceeding.

Effect Where Officer has no Authority to Appoint.—If the probate act should confer no authority to appoint an administrator in certain cases, an attempt to make an appointment in the cases not provided for would unquestionably be void. And its invalidity would of necessity appear from the face of the record. Thus, in *Wilson v. Imboden*, 8 La. Ann. 140, it appeared that clerks of courts were authorized by statute to appoint administrators in estates exceeding five hundred dollars in value, but of estates less than that amount, they should themselves assume the administration. In this case the estate was less than the required amount, and the appointment of an administrator was held to be void upon its face and collaterally assailable.

Effect Where Statute Fails to Provide for Estates of Persons Who Died Before Its Passage.—Somewhat similar to the preceding situation is that where the statute, in providing for the administration of decedents' estates, does not include the estates of those who died prior to its passage. In these cases the probate court has no power to appoint an administrator, and an attempt to do so would, it seems, be void upon its face. Thus, under the Mexican law as enforced in California prior to its admission as a state and before the passage of a probate act, the probate of an open will was unknown, the will taking effect as a conveyance upon the death of the testator. When a probate act was passed it was not framed so as to include wills executed previous to its passage, or estates of per-

sons who died prior thereto. The probate acts were, therefore, held not to embrace such cases, it being deemed that the intention of the legislature was to leave such estates to be settled under the Mexican law. Hence, the probate court had no power over such estates, and an attempt to assert its jurisdiction over such an estate was void and assailable in a collateral proceeding: See *Downer v. Smith*, 24 Cal. 114; *Tevis v. Pitcher*, 10 Cal. 465; *Coppinger v. Rice*, 33 Cal. 408; *McNeill v. Congregational Soc.*, 66 Cal. 105, 4 Pac. 1096.

Judge Disqualified to Act.—In *Hussey v. Southard*, 90 Me. 296, 38 Atl. 221, it appeared that a probate judge was himself appointed by a testator to be executor of a will. Such probate judge appointed a special administrator of another estate, to which the estate represented by him as executor was largely indebted. The court held that the judge was not qualified to appoint such special administrator, even before the probate of the will of which he was named executor, and that such appointment was void.

Effect Where Testator not Dead.—By the great weight of authority, letters of administration may be attacked anywhere in any proceeding, if in fact the intestate was not dead, and the fact that the probate court found and that the record recites that the testator is dead is not conclusive, but is wholly immaterial. No administration can be had on the estate of a living person, and an attempted administration is void for all purposes: See *Epping etc. Co. v. Robinson*, 21 Fla. 36; *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Flisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Springer v. Shavender*, 116 N. C. 12, 47 Am. St. Rep. 791, 21 S. E. 397; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108; *Griffith v. Frazier*, 8 Cranch, 9; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *State v. White*, 7 Ired. 116; *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *D'Arusment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; *Stevenson v. Superior Court*, 62 Cal. 60; *Moore v. Smith*, 11 Rich. 569, 73 Am. Dec. 122; *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458. Even those states which consider probate courts courts of general jurisdiction, and recognize the conclusive character of their acts and decrees in collateral proceedings, hold this to be one exception to the rule that probate decrees cannot be impeached collaterally by proof outside the record: *Epping etc. Co. v. Robinson*, 21 Fla. 36; *Quidort v. Pergeaux*, 18 N. J. Eq. 472. Chief Justice Marshall, in holding that administration granted on the estate of a living person was totally void, said, in *Griffith v. Frazier*, 8 Cranch, 9: "The ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue, yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not

vest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." This statement of Chief Justice Marshall has been quoted with approval in very many of the later cases. The theory upon which all these cases are decided is that where the testator is alive the court has no authority whatever to act at all. It cannot deliberate upon the question of life or death. As was said in *Melia v. Simmons*, 45 Wis. 834, 80 Am. Rep. 746: "There is no class of cases which embraces the administration of the estates of living persons, as if they were dead. The proceedings are void ab initio and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate, or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the county court has, in respect to the administration of estates, is over the estates of dead persons." The same doctrine was approved in the comparatively recent case of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, where the United States supreme court reviewed at length the authorities upon the subject, and held that all proceedings of probate courts are dependent upon the fact that a person is dead, and are null and void if he is alive. "They have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate. A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate, and not because its decision upon the question whether he is living or dead can in anywise bind or estop him, or deprive him, while alive, of the title or control of his property."

But few cases can be found which sanction the doctrine that letters of administration granted on the estate of a living person are conclusive and unassailable on collateral attack. Indeed, New York seems to be the only state in which this doctrine is held. And even here it is admitted that at common law letters of administration granted on the estate of a person who is alive are an absolute nullity: *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316, 32 Am. Rep. 309. The case which established the New York doctrine was *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, three of the judges dissenting. The decision is really based upon the provisions of the New York statute which confer upon surrogates jurisdiction over the subject of granting letters of administration. In the course of its opinion, the court said: "While the statute gives him no jurisdiction to administer upon the estate of a liv-

ing person, it imposes upon him the duty of inquiry as to the death of any person upon whose estate letters of administration are applied for, and the inquiry is a judicial inquiry. In discharging that duty, he may examine the person applying for letters and examine other witnesses, and in making such examination he is discharging his judicial functions and exercising his rightful jurisdiction. . . . When proof has been produced to his satisfaction, the other conditions of the statute being complied with, he must issue letters. The inquiry may be a difficult one. In many cases in the time of war, in the cases of absences upon the seas, or in foreign lands, and in the case of long absence unheard from, death cannot be proved with infallible certainty. Witnesses may be untruthful or mistaken, and the surrogate may thus be led into error, yet he must act; the statute makes it his duty to do so. He must decide upon the fact of death as best he can upon the evidence produced, exercising a judgment not infallible. Does he decide at his peril? . . . The claim is, that if death has not occurred, although the surrogate may have been satisfied by the clearest proof before him that death had occurred, his proceedings are a nullity for want of any jurisdiction to act. The consequence is that they furnish no protection to anyone. The surrogate, who has in good faith ordered the sale of property and the distribution of money, may, in after years, be made liable for the whole estate. After many years it may be a question whether the intestate died in one month or in another month, earlier or later; and shall the jurisdiction of the surrogate and the validity of his proceedings and his protection against liability depend upon how this question may be determined by a jury upon disputed evidence? . . . A construction of the statutes which will lead to such results will make the laws as to the jurisdiction and proceedings of surrogates' courts difficult and hazardous to execute, and should not be tolerated unless the language used will admit of no other construction. I am of opinion, taking into consideration the various provisions of the statutes, that it was the intention of the legislature to confer upon surrogates' courts sole and exclusive jurisdiction over the subject of granting letters of administration, and as part of that jurisdiction to determine the facts, upon sufficient evidence, upon which their action must rest." This quotation is the best and almost the only statement of the rule that letters of administration are conclusive evidence of the jurisdictional facts, including the testator's death, upon a collateral attack. Practically the same case, between the same litigants, arose in *Roderigas v. East River Sav. Inst.*, 78 N. Y. 316, 32 Am. Rep. 309, and the court, while not reversing its former ruling, held, nevertheless, that there had been no due proof of death so as to give the surrogate jurisdiction, and that the letters of administration, having in fact been issued by the clerk instead of by the court, were void, since the judicial powers of the surrogate could not be delegated. Although this decision limits, to some extent, the effect of the first decision,

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yet the case as reported in *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, has been approved by later New York cases and seems to be the settled doctrine of that state: See *O'Connor v. Huggins*, 118 N. Y. 511, 21 N. E. 184, and *Bolton v. Schriever*, 135 N. Y. 65, 81 N. E. 1001. This leading New York case was followed in *Scott v. McNeal*, 5 Wash. 309, 34 Am. St. Rep. 863, 31 Pac. 873, which decision was reversed by the United States supreme court in an elaborate opinion in *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108. *Davis v. Greve*, 32 La. Ann. 420, might, at first blush, seem to enunciate a similar doctrine, it being held here that the decision of a judge, in proceedings to appoint an administrator, that the intestate was dead could not be questioned collaterally. But in this case there seems to have been no evidence that the deceased was still alive, and naturally, if there were nothing to show the opposite, the decision of the probate judge would be conclusive. And an earlier case seems to have settled the rule in Louisiana in harmony with the great weight of authority: *Burns v. Van Loan*, 29 La. Ann. 560. The New York cases would seem to stand alone upon this point. The better rule undoubtedly is that letters of administration may be collaterally impeached if the testator was alive at the time they were issued.

Effect Where There is no Vacancy in the Office.—If at the time letters of administration are granted other letters are in existence which were previously granted, the authorities are practically unanimous in holding that the second appointment is void so that it may be collaterally assailed. Such second appointment is an absolute nullity and may be attacked in any proceeding: *Fisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Epping etc. Co. v. Robinson*, 21 Fla. 36; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Grande v. Chaves*, 15 Tex. 550; *Petigru v. Ferguson*, 6 Rich. Eq. 378; *In re Bowman's Estate*, 121 N. C. 373, 28 S. E. 404; *Watkins v. Adams*, 32 Miss. 333; *Estate of Hamilton*, 84 Cal. 464; *Creath v. Brent*, 3 Dana, 129; *Burnley v. Duke*, 2 Rob. (Va.) 108; *Matthews v. Douthitt*, 27 Ala. 273, 62 Am. Dec. 765; *Rambo v. Wyatt*, 32 Ala. 363, 70 Am. Dec. 544; *Munroe v. People*, 102 Ill. 406. Thus, in *Fisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128, it was said that "the appointment of an administrator on the estate of a deceased whose executor was present, in the constant performance of his duties, would be absolutely void." In some of the cases it is said that the fact that letters have already been lawfully granted in the state and not revoked, and the other fact that the supposed intestate is not dead, constitute the only two exceptions to the rule that letters of administration cannot be impeached collaterally by proof outside the record: *Epping etc. Co. v. Robinson*, 21 Fla. 36; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Ames v. Williams*, 72 Miss. 760, 17 South. 762. The theory upon which these cases are based is that there cannot be two valid grants of administration on the same estate in the same state: *Watkins v. Adams*, 32 Miss. 333. If both administrators have been appointed by the

same court, it is clear that the second would have no authority to act, since by making the first appointment the power to grant letters of administration in the particular estate would be exhausted: *Munroe v. People*, 102 Ill. 406; *In re Bowman's Estate*, 121 N. C. 373, 28 S. E. 404. In this case it was said that "the law could not tolerate such a condition of things as would ensue if the clerk could appoint subsequent administrators, leaving the letters of former ones unrevoked; nor will it permit suits at law raising the issue of fact to be tried between two rival administrators as to which one of them is entitled to the office." If the first grant of administration was void, then a court having competent jurisdiction may proceed to grant letters, and the grant will not be ineffectual from the fact that the former void letters have not been revoked: *Ex parte Barker*, 2 Leigh, 719. We apprehend, however, that the first grant of letters must be void upon their face in order to justify a second grant, since if the first administration is regular on its face, and the court found that it had jurisdiction over the particular estate, any error in this particular could not be assailed in a collateral proceeding, and there would be no way of showing that the first administration was void: See *Petigru v. Ferguson*, 6 Rich. Eq. 378. There must, however, be a complete grant of letters and not merely an abortive attempt to secure them: *Estate of Hamilton*, 34 Cal. 464. It might appear from some of the cases that the rule that a grant of administration is void and assailable collaterally where a previous grant stands unrevoked applies only where the two administrations have been granted by the same court: See *In re Bowman's Estate*, 121 N. C. 373, 28 S. E. 404; *Munroe v. People*, 102 Ill. 406. Certainly, this cannot be the case. The rule applies to two grants of administration by any courts in the same state: *Watkins v. Adams*, 32 Miss. 333. This was clearly brought out in the case of *Petigru v. Ferguson*, 6 Rich. Eq. 378, the court saying: "The grant of administration by the ordinary of Abbeville, which preceded that made by the ordinary of Edgefield, was, as the chancellor has properly ruled, such a judgment as carries the right, until vacated and annulled. This judicial officer, having a general cognizance of questions relating to the right of administration—and, therefore, being legally competent to determine them—must necessarily be clothed with authority to consider and decide the sufficiency of the evidence presented to him for establishing the facts from which the right arises. The judgment rendered by him must be conclusive of the facts necessary to sustain it, until it is reversed. It cannot be impeached collaterally, and can only be set aside by a direct proceeding. There was, therefore, no room for a second grant of administration in a different district. A second grant is null until the first grant is recalled. The ordinary of Edgefield could not revoke the letters granted by the ordinary of Abbeville; and, until they were revoked, he had no authority to grant other letters. The authority conferred by letters of administration

is a general authority operating throughout the state. There can be but one administration. And the conferring the office, with the authority appertaining to it, exhausts the whole subject, and leaves nothing to be done, of like kind, until the authority conferred has been revoked. It would be highly pernicious if such a thing could exist as two administrations going on at the same time. If there can be two, there can be as many as there are districts in the state. How perplexing this would be to creditors, or others having claims on the estate, or liable to claims by it, and how impossible it would be to draw all these administrations to one final result, can scarcely be imagined."

Even if there has been a former administration, the record in a subsequent appointment need not show affirmatively that there was then a vacancy in the administration. The second appointment cannot be collaterally attacked merely because the record fails to show a vacancy: *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809. In the absence of evidence to the contrary, such a vacancy will be presumed: *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809. The mere fact that a second administrator has been appointed is, in itself, prima facie evidence that there was a vacancy in the administration: *Chappell v. Doe*, 49 Ala. 153; *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1068.

In *Culver v. Hardenbergh*, 87 Minn. 225, 33 N. W. 792, a distinction seems to be drawn between the appointment of a second administration in a new, original, and independent proceeding instituted for that purpose, and the appointment of a second administrator in the original proceedings, when the authority of the first administrator has not been extinguished. In the first case the appointment is void, because the court has completely exercised its jurisdiction over the estate and has no further power in the matter. In the second case, the court has complete jurisdiction over the estate by reason of the original proceedings, and if it commits an error in making a new appointment before the original one is set aside or ended, this is mere error, valid until set aside, and cannot be assailed in a collateral proceeding. And in *Garrett v. Boeing*, 68 Fed. 51, it was held that an appointment of an administrator could not be questioned in a collateral proceeding on the ground that the succession was not vacant, where the sole claim that there was no vacancy was based upon the statement that the succession had been assumed by the heirs by a tacit acceptance, but this fact had been adversely passed upon by the court at the time the administrator was appointed. These two cases, therefore, are not in conflict with the numerous cases holding that the appointment of an administrator may be attacked collaterally when at the time of his appointment there was no vacancy in the office.

Effect of Nonresidence of Decedent.—The statutes of most, if not all, of the states provide that letters of administration shall be granted only in the county in which the deceased was a resident,

or, if he was a nonresident, in the county in which he left property. The question has, therefore, frequently arisen as to what effect is caused if the decedent was not a resident of the county in which the letters were granted. If it should appear from the face of the letters themselves that they were granted in a county other than the one where the deceased resided, the letters would show their own invalidity and would be declared void in any proceeding, direct or collateral: *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Moore v. Philbrick*, 32 Me. 102, 52 Am. Dec. 642; *McFeely v. Scott*, 128 Mass. 16; *Estate of Harlan*, 24 Cal. 182, 85 Am. Dec. 58. And it might also seem, from what has been said before, that somewhere in the record, either from the petition or elsewhere, should appear the necessary jurisdictional fact that the deceased was a resident of the county. The record should, *prima facie*, show jurisdiction; See, in addition, *Goodrich v. Pendleton*, 4 Johns. Ch. 549.

The question has most frequently arisen, however, where the petition asking for letters of administration, or the letters themselves, state that the deceased was a resident of the county, and it subsequently turns out, as a matter of fact, that this statement was untrue. In such case can the letters be collaterally assailed? Some of the earlier cases, even in those states which now recognize a different doctrine, seem to assert the doctrine that not only must the record show that the deceased was a resident of the county in which administration is granted, but that this allegation in the record must be true in point of fact; and if not true in point of fact the proceedings are utterly void and may be questioned in a collateral proceeding: *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Cutts v. Haskins*, 9 Mass. 543. But, as is so clearly stated by Mr. Freeman, on his work in *Judgments*, volume 1, section 120, a petition is usually presented to the court or judge in which the jurisdictional facts are stated. "The duty of the court or judge is to investigate and determine the truth of these jurisdictional allegations. Its subsequent grant of letters implies that these allegations have been found to be true. Hence, in a case where a probate court has, upon a petition asserting the essential jurisdictional facts, and after notice to the parties in interest, given in the manner prescribed by law, granted letters testamentary or of administration, the proceedings cannot be avoided collaterally, in the majority of the states, by proof that the deceased did not die within the jurisdiction of the court. Any other rule would lead to the most embarrassing results. The residence of a deceased person can be determined only by hearing parol evidence. Different judges may reach opposite conclusions from the same evidence. The parties in interest may, at separate times, produce different evidence on the same issue. If, after a court had heard and decided the issue concerning the residence of the deceased, the question remained unsettled to such an extent that it could be relitigated for the purpose of avoiding all the proceedings of the court, no person would have the temerity to

deal with executors or administrators." This is undoubtedly an accurate statement of the law as held by the great weight of authority: See *Driggs v. Abbott*, 27 Vt. 580, 65 Am. Dec. 214; *Fisher v. Bassett*, 9 Leigh. 119, 33 Am. Dec. 227; *Estate of Warfield*, 22 Cal. 51, 83 Am. Dec. 49; *Broughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474; *Kling v. Connell*, 105 Ala. 590, 53 Am. St. Rep. 144, 17 South. 121; *Irwin v. Scriber*, 18 Cal. 400; *Kelly v. Jay*, 79 Hun, 535, 29 N. Y. Supp. 933; *Donohue v. Daniel*, 58 Md. 595; *Tant v. Wigfall*, 65 Ga. 412; *Maybin v. Knighton*, 67 Ga. 103; *Holmes v. Oregon etc. Ry. Co.*, 5 Fed. 523; *Wight v. Wallbaum*, 39 Ill. 554; *Burdett v. Silsbee*, 15 Tex. 605; *Record v. Howard*, 58 Me. 225; *McFeely v. Scott*, 128 Mass. 16; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Missouri Pac. Ry. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283; *Bradley v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 283; *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001; *Eller v. Richardson*, 89 Tenn. 575, 15 S. W. 650. The determination of the probate court that the residence of the deceased was in the county where the application for letters is made, although it may be erroneous, is valid until set aside in some appropriate proceeding. It cannot be attacked collaterally: *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; *Tant v. Wigfall*, 65 Ga. 412; *Holmes v. Oregon etc. Ry. Co.*, 5 Fed. 523; *Raborg v. Hammond*, 2 Har. & G. 42; *Burdett v. Silsbee*, 15 Tex. 605; *Record v. Howard*, 58 Me. 225.

If the judgment of the probate court were not conclusive upon the question of residence, in a collateral proceeding, the court in *Garrett v. Boeing*, 68 Fed. 51, points out that a second judgment would be no more conclusive than the first, and that the question could be tried over again in every county in the state, with the possibility of as many different conclusions. An exceptionally convincing statement of the rule is to be found in *Raborg v. Hammond*, 2 Har. & G. 42, where it was said: "If such inquiry can be made in this incidental collateral mode of proceeding, you convert the county courts into appellate tribunals to revise and reverse the decrees of the orphan's court, on subjects over which, by law, they have the sole and exclusive jurisdiction, and in relation to which their acts can only be reviewed by regular appeal to the court of chancery or court of appeals; and this inquiry, too, if tolerated, would generally work injustice, and operate as a surprise upon the party. Without any direct or positive monition that the legality of his appointment were at all put in issue, he might be turned out of court by the admission of testimony which he did not anticipate, and of which he could have offered the most conclusive refutation, had an opportunity been afforded him. Resting, too, upon verdicts of juries, the question of administration would ever be involved in perilous uncertainty; a verdict delivered in one case would be no evidence on a trial in another; conflicting verdicts might be given by different juries in the same term, and in the same court; and much more

probable is it, that such incongruity would arise where trials are had in different courts, or at different terms. Indeed, it might not infrequently happen, in such a state of interminable controversy, that an administrator, after recovery of one-half the property and debts belonging to the deceased, by the death of witnesses, or some such cause, might be forever deprived of all chance of recovering the residue, the proof to sustain his right to the administration being no longer attainable, a result ruinous as well to creditors as to helpless widows and orphans, who have ever been the especial objects of favor and protection of the law. Every consideration, therefore, of convenience, justice, and public policy, demands that the question of administration, when finally determined by the tribunals created for that purpose, should never be a subject of doubt or litigation when incidentally arising in other courts. Such an anomaly in judicial proceedings this court would never willingly sanction."

In some states, the record need not show that the deceased was a resident of the county in which letters are granted. A complete silence raises a presumption of regularity of procedure sufficient to sustain the appointment upon collateral attack: See *Ames v. Williams*, 72 Miss. 760, 17 South. 762; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852, 19 S. W. 547; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. In most of the states, however, as we have seen, the recital in the petition that the deceased resided in the county is a sufficient record of this fact to sustain the appointment when assailed collaterally.

In *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, the same rule was applied to the question of residence as was applied to the question of death. The two facts were deemed to be controlled by the same considerations. As to the fact of death, however, this view has not been adopted elsewhere.

There are a few jurisdictions in which a grant of letters on the estate of one who did not die within the jurisdiction of the court may be collaterally attacked, even though this jurisdictional fact is averred in the record, and was actually found upon evidence by the court. Such seems to be the rule in Rhode Island, where courts of probate are said to be courts of limited jurisdiction; and as to such courts, where their jurisdiction depends upon some collateral fact which can be decided without going into the merits of the case, its jurisdiction can be collaterally assailed: *People's Sav. Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211. This view seems to be the result of failing to recognize probate courts as courts of general jurisdiction within the limits of their powers. This would appear to be the error of *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237, which is not a correct statement of the law as it has been recognized in this state for many years. To the same effect is *Olmstead's Appeal*, 43 Conn. 110, where a collateral attack upon an administrator's right to act seems to be recognized. Miller

v. Swan, 91 Ky. 36, 14 S. W. 904, viewing the question of residence as a jurisdictional one, held that an administrator's right to act could be attacked in a collateral proceeding, if his letters had been granted in the wrong county. The court so held, notwithstanding the evidence was conflicting. An early Georgia case permitted a collateral attack upon letters where the deceased did not reside in the county granting them: *Griffith v. Wright*, 18 Ga. 173. The contrary rule has, however, been since recognized in Georgia, after the code had declared that probate courts were courts of general jurisdiction, so that no collateral attack is possible at the present time upon this ground: *Maybin v. Knighton*, 67 Ga. 103; *Tant v. Wigfall*, 65 Ga. 412.

The courts which hold that letters of administration may be collaterally impeached if in fact the deceased was not a resident of the county in which the letters were issued, are few in number. The contrary doctrine not only has the support of the great weight of authority, but is sustained by the most substantial reasons, as we have indicated.

Effect of Irregular Procedure.—Mere irregularity in procedure has never been deemed a good ground for a collateral attack upon the appointment of an administrator, where the court has jurisdiction to proceed in the matter. If the court has jurisdiction, any irregularity in the appointment can make it voidable and revocable only, and not void: *Broughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474; *Ex parte Maxwell*, 37 Ala. 362, 79 Am. Dec. 62; *Wight v. Wallbaum*, 39 Ill. 554; *Brink's Exp. Co. v. O'Donnell*, 88 Ill. App. 459; *Ryan v. American Freehold Co.*, 96 Ga. 322, 23 S. E. 411; *In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495; *Ferguson v. State*, 90 Ind. 38; *Boody v. Emerson*, 17 N. H. 577; *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456; *Emery v. Hildreth*, 2 Gray, 228; *Eslava v. Elliott*, 5 Ala. 264, 39 Am. Dec. 326; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. Rep. 369; *Francisco v. Chicago etc. Ry. Co.*, 35 Fed. 647. Thus, the taking oath and giving bond are required of an administrator by law, yet failure to do these things will not render his appointment void in a collateral proceeding: See *Ryan v. American Freehold Co.*, 96 Ga. 322, 23 S. E. 411; *In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495. If the probate court exercised its authority irregularly in not strictly following the precedent steps required by the statute, its appointment of an administrator cannot be attacked. *Glendenning v. McNutt*, 1 Idaho, 502. The grant of letters is conclusive evidence that all prerequisites have been complied with: *Eslava v. Elliott*, 5 Ala. 264, 39 Am. Dec. 326. The regularity of an appointment can only be questioned in some direct proceeding: *Denver etc. Ry. Co. v. Woodward*, 4 Colo. 1.

While the courts appear to be unanimous in holding that mere irregularity of procedure is no ground for collateral attack, yet there may be some difference of opinion as to what constitutes mere irregularity, or the statutes may vary as to what steps are neces-

sary before the probate court acquires jurisdiction. Thus, in *Elgutter v. Missouri Pac. Ry. Co.*, 53 Neb. 748, 74 N. W. 255, it was held that the Nebraska statute required not only a sufficient petition for administration, but also that a notice of the application for the appointment of an administrator should be personally served upon all persons interested, that the giving of notice was as essential to jurisdiction as the filing of a petition, and that a failure to give notice prevented the court from acquiring jurisdiction. The administrator's appointment could, therefore, be attacked in a collateral proceeding. The failure to cite a particular interested party is not generally held to be essential in order to sustain the appointment in a collateral proceeding. Thus, in *Kelly v. West*, 80 N. Y. 139, a failure to cite the widow of the deceased was said to be an irregularity, for which the letters might be revoked, but that the letters were not thereby rendered void and subject to collateral attack. And in *Taylor v. Hosick*, 13 Kan. 518, where a person not a relative or creditor was appointed administrator, without citing any of the relatives or creditors to appear, the appointment was held to be erroneous merely, and not subject to collateral attack, although the court should have appointed a relative or creditor unless they renounced the administration. But these matters were deemed not to be jurisdictional. In *Barclay v. Kimsey*, 72 Ga. 725, the court held that the fact that an administration was granted upon an insufficient citation, as to the length of time it was published, could not be shown in a collateral proceeding. It was said in *James v. Adams*, 22 How. Pr. 409, that a surrogate obtains jurisdiction of the estate of an intestate by the residence of the intestate, and not by the citation of the proper parties before him. Hence a collateral attack could not be made on the appointment of an administrator merely because no citation had been issued. This provision of the statute was merely directory and not jurisdictional. The fact that the notice of hearing was served on the day the order was made appointing the administrator, constitutes nothing more than an irregularity which cannot form the basis for a collateral attack upon the letters of administration: *Chilton v. Union Pac. Ry. Co.*, 8 Utah, 47, 29 Pac. 963. Notice to the proper parties by publication seems to have been regarded by Chief Justice Cooley as a jurisdictional matter in *Gillett v. Needham*, 37 Mich. 143. In this case the statute required that notice of the application for the appointment of an administrator should be published for a certain length of time in a designated paper, and proof was authorized to be made by affidavit of the printer. Here the affidavit was made by a printer in the office of —, not naming any paper. This was held to be fatally defective, and there being no other evidence in the record to show that the proper notice was given, the court was held to have acted without jurisdiction. The appointment was, therefore, void, and could be collaterally assailed. The publication of the notice being by statute a prerequisite to the court's obtaining

jurisdiction to appoint an administrator, this case would seem to be one where the invalidity appeared upon the face of the proceedings, and hence correctly decided: See, as approving this case, *Breen v. Pangborn*, 51 Mich. 29, 16 N. W. 188. A dictum in the case just cited to the effect that parties interested may always object to the want of jurisdiction in the court which issued letters of administration, seems to be too broad a statement of the rule as recognized and followed by most of our courts of last resort.

The Premature Appointment of an Administrator has been held to render the appointment voidable only and hence not subject to collateral attack: *Hutcheson v. Priddy*, 12 Gratt. 85. The statutes of Virginia did not permit the appointment of a sheriff as administrator before the expiration of three months from the death of the testator or intestate, and in this case the appointment was made prior to the expiration of the three months. But the court held that the appointment was not void but voidable. The probate or county court was recognized as having general jurisdiction to grant administration, and having taken action, the administrator's appointment could not be questioned in any collateral proceeding: See, also, *Francisco v. Chicago etc. Ry. Co.*, 35 Fed. 647.

Effect of Joining Application on Several Estates.—The question has arisen several times whether a collateral attack could be made upon the authority of an administrator, where in the application for his appointment several estates were included, and the court, by one order, granted the letters upon all of the estates. Such a proceeding is clearly irregular, but it has been invariably held that the appointment was nothing more than irregular, and hence that its validity could not be drawn in question in a collateral proceeding: *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329. It appears to be necessary that the court should have had jurisdiction over all of the estates, otherwise it would seem that the proceedings would be void: *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 885; *Grande v. Herrera*, 15 Tex. 534. In the last case cited it was said that "the grant including two estates under one administration is something of a novelty, but would not be void, either in whole or in part, if the court had jurisdiction over both estates. It would, in many cases, be productive of inconveniences; in others it would seem to be quite proper and convenient, as in cases of joint property or community of goods between husband and wife."

Effect of Failure to Give Bond.—The failure of a person appointed administrator to give a bond does not usually make letters of administration void; they are, for such reason, only irregular and voidable, and hence, are not subject to collateral attack: *In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495; *Ex parte Maxwell*, 37 Ala. 362, 79 Am. Dec. 62. Neither can the question of the sufficiency of the administrator's bond be raised collaterally in a suit by the administrator: *Lowman v. Elmira etc. R. R. Co.*, 85 Hun, 188, 32 N. Y. Supp. 579. A judgment against an administrator is not rendered

void merely because the administrator, prior to the entry of such judgment, had failed to give the bond required by law: *Ryan v. American Freehold Co.*, 96 Ga. 322, 23 S. E. 411. It cannot be inferred that the necessary bond was not given, because it is not recited in the order appointing the administrator. And the order appointing an administrator cannot be collaterally attacked because of a noncompliance with the law relative to the giving of a bond: *Barclay v. Kimsey*, 72 Ga. 725. The fact that an administration bond was signed several years before the grant of administration is immaterial, if the obligors signed it with reference to the administration of all estates that might be committed to the hands of the administrator by the order of the court of that county. This fact furnishes no ground for a collateral attack upon the appointment of the administrator: *Kling v. Connell*, 105 Ala. 590, 53 Am. St. Rep. 144, 17 South. 121. There seems to be one case in which, in a collateral proceeding, it will be presumed that a bond was not given as required. This is where one administrator is appointed upon condition that he file a bond, and no such bond can be found, and a subsequent administrator is appointed, the validity of the second appointment being collaterally attacked. It will be presumed, in these collateral proceedings, for the purpose of sustaining the validity of the second grant of administration, that the first administrator failed to comply with the condition and file his bond: *Gray v. Cruise*, 36 Ala. 550.

Effect Where no Necessity for Appointment.—Letters of administration cannot be attacked in a collateral proceeding on the ground that there was no necessity for the appointment of an administrator. The question of necessity is one for the probate court to determine, and having done so its decision cannot be collaterally questioned: *Ormsbee v. Piper*, 123 Mich. 265, 82 N. W. 36; *Ferguson v. Templeton* (Tex.), 32 S. W. 148. The mere fact of appointment is an adjudication of the necessity for the appointment, which is conclusive in a collateral issue: *Stewart v. Smiley*, 46 Ark. 373. In California there is nothing in the probate law which would, either expressly or impliedly, exempt the property of an estate of sufficient size from the requirement of administration. Hence, the fact that the heirs agree to divide the estate and that there shall be no administration is immaterial, and will not render letters of administration granted to a public administrator assailable upon the ground that there was no necessity for administration upon the estate: *Estate of Strong*, 119 Cal. 663, 51 Pac. 1078.

Effect of no Debts.—The fact that the decedent left no debts to be paid furnishes no ground for attacking the appointment of an administrator in a collateral proceeding: *Garrett v. Boeing*, 68 Fed. 51.

Effect Where Decedent Left Will.—At one time the rule seems to have been firmly established that if administration was granted upon the supposition that no will existed, and it subsequently turned out that there was a will, all the proceedings under the administra-

tion were void. And if void they were collaterally assailable: *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. Dec. 372; *Griffith v. Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 33. And this was true whether the will was suppressed, or its existence was unknown, or it was doubtful who was executor, or he was concealed or abroad at the time administration was granted: *Brock v. Frank*, 51 Ala. 85. The reason for this rule seems to have been that the law traced the title and authority of an executor to the will, and without regard to the time of probate his authority extended back to the time of the testator's death. Before probate he could do nearly all the acts which he could do after probate. "The grant of administration before probate was in derogation of his right and title, of which he could not by judicial sentence be collaterally deprived": *Brock v. Frank*, 51 Ala. 85.

At the present day, however, the rule seems to be firmly established to the contrary. So that, where letters of administration are granted in ignorance of the fact that there is a will, and afterward upon the discovery of the will it is probated, and letters with the will annexed are granted to another person, the grant of the first letters is not void, but voidable, and the acts performed by the first administrator are binding in a collateral proceeding: *Smith v. Smith*, 168 Ill. 488, 48 N. E. 96; *Broughton v. Bradley*, 34 Ala. 604, 73 Am. Dec. 474; *Shepherd v. Rhodes*, 60 Ill. 301; *Quidort v. Pergcaux*, 18 N. J. Eq. 472; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 15 Am. St. Rep. 494, 22 N. E. 572; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61.

The earlier doctrine prevailed in England where an executor derived practically his entire power from the will and not from his appointment. Probate was essential only to establish by judicial sentence his right and authority. Nearly everything he could do after probate he could do before: *Brock v. Frank*, 51 Ala. 85. By statute in this country, the authority of an executor is derived largely from his appointment by the probate court. His position and relation to the estate have been much altered by legislation. Specific acts in many of the states provide for the revocation of letters granted to an administrator when a will is subsequently discovered. And as pointed out by the court in *Shepherd v. Rhodes*, 60 Ill. 301, "The power to revoke and repeal letters of administration upon the production and probate of the will, necessarily presupposes the power to grant the administration." Hence, it inevitably follows that until revoked the letters are valid to support and give validity to any acts done under them, and in a collateral proceeding they cannot be questioned. The sole inquiry seems to be: "Has the probate court jurisdiction in the particular case?" If it has, that is, if the supposed intestate is dead, and was a resident of the county where the letters are asked for, and no prior administration has been granted, then the letters cannot be collaterally assailed merely because a will is subsequently discovered: See

Schluter v. Bowery Sav. Bank, 117 N. Y. 125, 15 Am. St. Rep. 494, 22 N. E. 572; *Quidort v. Pergeaux*, 18 N. J. Eq. 472. It would seem that if there were living executors already appointed and qualified and capable of acting, a subsequent appointment of an administrator, in ignorance of the existence of a will and its probate, would be void: See *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61. But in such a case the appointment would be void for another reason—namely, because there was no vacancy in the administration.

Effect Where Decedent Leaves no Estate in the County or at all.—While it is generally required that the decedent should have died or have left property in the county where letters of administration are granted, the fact that no estate was left cannot generally be shown in a collateral proceeding for the purpose of invalidating an administrator's appointment. If the decedent is actually dead and his estate without administration, the probate court has jurisdiction to determine whether he left an estate to be administered upon. And if the court finds that he did leave an estate which could be administered upon in that county, its order granting letters for that purpose cannot be avoided in a collateral proceeding by evidence showing that the decedent did not leave assets in the county or at all: See *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Barclift v. Treece*, 77 Ala. 528; *Robinson v. Epping etc. Co.*, 24 Fla. 237, 4 South. 812; *Vinet v. Bres*, 48 La. Ann. 1254, 20 South. 693; *Murphy etc. Co. v. Creighton*, 45 Iowa, 179; *Weir v. Monahan*, 67 Miss. 434, 7 South. 291; *Ela's Appeal*, 68 N. H. 36, 38 Atl. 501.

Since probate courts have been regarded as courts of general jurisdiction, with the most complete power over the subject of estates, the rule has been very generally recognized that an erroneous decision by such courts upon such facts as the place of residence of the deceased or the existence of assets in the county, or at all, does not render the grant of administration void, but merely voidable, and in a collateral proceeding the administrator's authority cannot be questioned: *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Barclift v. Treece*, 77 Ala. 528. The same reasons for sustaining the authority of an administrator in a collateral proceeding apply to cases where the decedent left no estate in the county the same as to those cases where the decedent did not die in the county where the letters were issued. For this reason it is unnecessary at this point to further elaborate the reasons for this rule, as they are stated in an earlier division of this note. In *Vinet v. Bres*, 48 La. Ann. 1254, 20 South. 693, it was pointed out that if the right of an acting administrator could be collaterally assailed upon this ground, the settlement of the estate might be indefinitely prolonged. Even if a probate court had no authority to appoint an administrator, because there was no estate in the county to be administered, the subsequent bringing of property into the county by the administrator appointed confers jurisdiction of the subject matter upon the court, so that it can charge him with such property, in the exercise of its

common-law jurisdiction over the estates of deceased persons: *Ela's Appeal*, 68 N. H. 35, 88 Atl. 501. The mere existence of property in the county is insufficient to confer jurisdiction, where the decedent resided in another county. And where, in such a case, the petition for letters recites that the decedent resided in another county, the want of jurisdiction appears upon the face of the proceedings, making the grant of letters void, and they may be assailed collaterally: *In re Estate of King*, 105 Iowa, 320, 75 N. W. 187.

A different rule from the one here considered seems to have been enunciated in *Perry v. St. Joseph etc. R. R. Co.*, 29 Kan. 420. This was a suit by an administrator against the railroad company to recover damages for causing the death of the decedent. The court held that the defendant might show that the decedent did not die, and did not leave property, in the county where the letters were granted. It appeared from this evidence that the decedent was not an inhabitant of the state at the time. The court classed this case with those in which administration has been granted on the estate of a living person, in which case it is clear that the fact that the supposed intestate was still alive can be shown even in a collateral proceeding, for the purpose of invalidating an administrator's appointment. In reaching this decision the court said: "The probate court of Doniphan county had no authority to grant letters of administration unless the deceased left an estate in that county; and it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction, for this would be, to use a common expression, 'reasoning within a circle.' The probate court of that county, we suppose, assumed that the deceased left an estate to be administered, and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective, than if the probate court of Doniphan county had granted letters of administration upon her estate when in fact she was not dead. In either case, the appointment of an administrator would be void for all purposes; and, as in this case, the jurisdiction of the probate court rests upon the fact of an estate belonging to the deceased in Kansas, if the defendant can clearly show that the deceased died without leaving any estate of any kind, it must result that the entire proceedings before the probate court were without jurisdiction, and void." This decision is in conflict with the great weight of authority, and, we believe, opposed to every substantial reason. As we have previously seen, convenience, justice, and public policy demand a different rule when the administrator's authority is drawn in question in a collateral proceeding. It may be that this Kansas decision can be sustained upon this theory: If it appears from the records of the probate court that the only assets in the state were the right of action to recover damages for the decedent's death, and the court holding that such damages were not in any sense as

sets of the estate, then the want of jurisdiction in the probate court would appear from the face of the proceedings, and being void upon their face, the grant of administration could be attacked in any proceeding. Otherwise, this Kansas case lacks the support of both reason and authority.

Administration After Succession Once Closed.—A probate court has no power to reopen a succession which has once been administered and closed. A grant of administration under such circumstances is without jurisdiction and void, and may be attacked in a collateral proceeding: *Fish v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643. Where the estate has been fully administered, the probate court has exhausted its jurisdiction and authority over such estate. And an order which the court has no power under any circumstances to make is null and void, and its nullity can be asserted in any collateral proceeding where it is relied upon in support of a claim of right: *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

Effect of Lapse of Time.—A grant of administration originally void for want of jurisdiction acquires no validity by mere lapse of time. In *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. Dec. 372, a lapse of twenty years and more was held not to validate the acts of an administrator appointed by a court having no jurisdiction, and his acts could be collaterally attacked. To the same effect is *Holyoke v. Haskins*, 9 Pick. 250. But in *Halbert v. De Bode*, 15 Tex. Civ. App. 615, 40 S. W. 1011, where an administrator was recognized by the court and all parties interested in the estate for a period of eighteen years, it was held that in a collateral proceeding it would be conclusively presumed that he was the legal administrator. In *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789, the court held that no valid grant of administration upon an estate could be had after the decedent had been dead for more than fifteen years, especially where the administration was obtained for a fraudulent purpose, and that such a grant would be held invalid even in a collateral proceeding. The action of the probate court in extending the time within which an administrator shall qualify cannot be collaterally attacked: *Willard v. Cleveland*, 14 Tex. Civ. App. 557, 38 S. W. 222. And an appointment made before the expiration of twenty days as prescribed by statute was a mere irregularity which would not render the appointment assailable collaterally: *Francisco v. Chicago, etc. Ry. Co.*, 35 Fed. 647.

Competency of Appointee to Act as Administrator.—The decision of the probate court as to the competency of a person to serve, to whom letters testamentary were issued, cannot be collaterally attacked. If the court has jurisdiction to act in the matter, a wrong decision will not render the appointment void so that it can be drawn in question collaterally: *Berney v. Drexel*, 12 Fed. 393. Hence, where the court is required by statute to grant letters to a

relative of the deceased, an appointment cannot be collaterally assailed by showing that the letters were not issued to a relative: *Oaujolle v. Ferrie*, 13 Wall. 465. Where the public administrator is the only person allowed by law to whom administration can be granted, the question whether the person appointed administrator was or was not the public administrator cannot be raised in a collateral proceeding: *Simmons v. Saul*, 138 U. S. 430, 11 Sup. Ct. Rep. 369. And the appointment of a general administrator instead of an administrator with the will annexed, where the court had jurisdiction to make the latter appointment, is merely an irregularity which renders the appointment voidable and revocable, but not void and collaterally impeachable: *Broughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474. Whether a particular person is a proper person to be appointed administrator is a question which necessarily arises at the time an appointment is made, and which the probate court has ample and full jurisdiction to adjudicate and determine. Such adjudication is conclusive in a collateral proceeding: *Lawrence v. Englesby*, 24 Vt. 42. Where one has been appointed administratrix and is in fact acting as such, her right to act cannot be collaterally attacked on the ground that she is not of age or that she has subsequently removed from the state: *Missouri etc. Ry. Co. v. McWhorter*, 59 Kan. 345, 53 Pac. 135. The decision of a surrogate in refusing letters of administration to a relative on the ground of unfitness, and appointing another person administrator, cannot be examined in a collateral proceeding. The letters of administration are conclusive in such a case: *Flinn v. Chase*, 4 Denio, 85. The fact that a husband is entitled to letters of administration on his wife's estate will not authorize him, in a suit against him by a third person who has been appointed administrator of his wife's estate, to impeach the validity of the letters granted to such third person: *Clark v. Clark*, 6 Watts & S. 85. Where letters of administration can be issued only upon the application of one interested in the estate, it cannot be urged, in a collateral action, that the letters were issued on the application of one not interested in the estate: *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697. In a proceeding by an administrator against the nonresident widow of a decedent who had not, for several years after his death, applied for letters of administration, she cannot be heard to say that the letters granted to the plaintiff were void, because she was the widow and had not waived her right to administer; at most, the appointment was only voidable, and could be attacked only in a direct proceeding: *Lyle v. Siler*, 103 N. C. 261, 9 S. E. 491.

Effect of Fraud.—It seems to be intimated in some of the cases that the right of an administrator to act may be collaterally attacked upon the ground of fraud in the procurement of his letters: See *Kelly v. Jay*, 79 Hun, 535; 29 N. Y. Supp. 933; *Broughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474; although in this last case,

the concealment of the existence of a will, and misrepresenting the amount of assets in the county, were held not to constitute such fraud as would be sufficient to collaterally impeach the appointment. And in *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789, it was said that: "Courts should not hold an administration valid, even in a collateral attack, when it is shown to have been obtained for fraudulent purposes and by methods violative of express law." There were, however, other facts in this case showing that the probate court had proceeded without jurisdiction in the case. It seems certain, however, that so far as the jurisdiction of a court of chancery is concerned, equity cannot give relief because of fraud in procuring a grant of letters of administration: 2 Freeman on Judgments, sec. 484a; *Langdon v. Blackburn*, 100 Cal. 19, 41 Pac. 814; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Case of Broderick's Will*, 21 Wall. 503. In this last case it was held that a court of equity had no jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake, or forgery, since this was within the exclusive jurisdiction of courts of probate. The effect is the same whether the attempt is to set aside the probate of a will, or to set aside a grant of letters of administration. This was so stated in *Simmons v. Saul*, 138 U. S. 439, 460, 11 Sup. Ct. Rep. 369, where a court of equity was deemed to have no jurisdiction to set aside the granting of letters of administration on the ground of fraud. Justice Story, in commenting on this rule as to the lack of power in equity to set aside letters of administration on the ground of fraud, said: "No other excepted case is known to exist; and it is not easy to discern the grounds upon which this exception stands in point of reason or principle, although it is clearly settled by authority." False statements in a petition for letters of administration even of jurisdictional facts, where the court passes upon such facts, does not render the letters granted vulnerable in a collateral attack: *Estate of Strong*, 119 Cal. 663, 51 Pac. 1078. It seems not to be altogether settled whether the granting of administration can be set aside because of extrinsic or collateral fraud, the same as the judgments and decrees of other courts: *Langdon v. Blackburn*, 100 Cal. 19, 41 Pac. 814. In view of the above authorities it would seem that this could not be done.

An Administrator Cannot Attack His Own Appointment in a collateral proceeding. This is the doctrine of the principal case, and it is undoubtedly sound, especially where the administrator has secured possession of assets belonging to the estate. In *Kling v. Connell*, 105 Ala. 590, 53 Am. St. Rep. 144, 17 South. 121, it was held that if an administrator, appointed by the probate court of the wrong county, accepts the appointment, and, acting thereunder, obtains possession of the assets of the estate and converts them, neither he nor his sureties can question the validity of his appointment. In *Ela's Appeal*, 68 N. H. 35, 38 Atl. 501, it was said to be
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useless to argue such a self-evident proposition. And it was also said that assuming that the court had no power to make the appointment because there were no assets in the county, yet the subsequent bringing of assets into the county by the administrator would confer jurisdiction upon the court, "and authorize it to charge him with the property, in the exercise of its common-law jurisdiction over the estates of deceased persons."

WHITHED v. ST. ANTHONY AND DAKOTA ELEVATOR COMPANY.

[9 N. Dak. 224, 83 N. W. 238.]

MORTGAGES — FORECLOSURE SALE — PURCHASER'S RIGHT TO RENTS—CROPS.—A purchaser of land at a foreclosure sale is substituted to the rights of the owner, and is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. Hence, where farm lands, which are being operated under a contract whereby the title to and possession of a stated portion of all the grain grown on the land are reserved in the owner as rent, are sold under foreclosure, the purchaser succeeds to the owner's rights, and is entitled to receive his share of the grain which falls due during the redemption period, and may invoke the same remedies the owner might have had to protect and enforce his interests in and under the contract.

LANDLORD AND TENANT — DEFINITIONS.—RENT is a comprehensive term embracing the compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof.

LANDLORD AND TENANT—LEASE.—A contract under which one is given exclusive possession of land for a stated length of time, and covenants not to commit waste or to sublet the premises, the owner reserving in himself title and possession to a specific portion of the crop which shall be raised, constitutes a lease.

LANDLORD AND TENANT—RENT NOT APPORTIONED.—Where rent is payable at stated periods, as quarterly or yearly, it will not be apportioned, in the absence of an express reservation, and a purchaser of the property before the rent falls due is entitled to the whole thereof.

MORTGAGES — FORECLOSURE — RIGHT OF PURCHASER.—A foreclosure sale operates as a conveyance to the purchaser at such sale of the entire beneficial interest of the owner, save the right of redemption, and the bare right of possession during the redemption period.

Burke Corbet and Corbet & Murphy, for the appellant.

O. A. Wilcox and Cochrane & Corliss, for the respondents.

225 YOUNG, J. This is an action in claim and delivery brought by a purchaser of real estate at foreclosure sale to re-

cover the possession of a quantity of wheat grown upon such land during the redemption period. The case was tried to the court without a jury, and findings of fact were made by the trial judge upon all material points. From the facts found the trial court concluded, as matter of law, that the plaintiff was not entitled to recover, and a judgment was entered dismissing the action. Plaintiff appeals from the judgment.

The appellant does not attack any of the findings of fact, but accepts them as correct. His only assignment of error is aimed at the trial court's conclusion that such facts do not warrant a recovery ²²⁴ by plaintiff. To make clear this point, upon which we must rule, a recital of a few facts is necessary: One Ditton was the owner of the land in question. On April 11, 1898, he entered into a written contract with one Filson, wherein the latter agreed to farm and cultivate said land at his own expense for the farming season of 1898. This contract was quite similar in its provisions to those commonly used when lands are operated upon shares. Ditton, the owner of the land, was to have one-half of all grain raised, to be taken from the machine, as his share. Filson, who produced the grain, was to have the other half of it as his share, but not until all of his various covenants and agreements in the contract had been kept and performed. Until that time the title and possession of all the grain grown were to be in Ditton. The land was farmed by Filson under this contract during the year 1898. A division of the grain was made, and Filson received his share. The share belonging to the other party to the contract was set apart, and is the wheat here involved. On April 19, 1898, Ditton executed and delivered to Thomas S. Edison, one of the defendants herein, a quitclaim deed to said land, which deed was in effect a mortgage to secure an indebtedness due the latter. On April 23, 1898, the land was sold by the sheriff of Nelson county under a foreclosure of a mortgage thereon executed by Ditton in 1894 to H. L. Whithed, the plaintiff in this action, to whom the usual sheriff's certificate of sale was executed and delivered. No redemption from this sale has been made. At the time of the threshing and division of the grain Edison took possession of one thousand and twelve bushels of wheat, which was the portion set over as rent, and caused the same to be conveyed to the defendant's elevator, where it was placed in a special bin, in his (Edison's) name. This is the grain in controversy, and was of the value of forty cents per bushel at the commencement of this ac-

tion. Possession of said grain was demanded by plaintiff prior to the commencement of this action, and refused.

It is appellant's contention that by virtue of his purchase of the land at the foreclosure sale on April 23, 1898, he came into all of the rights which either Ditton or Edison had in the contract under which the land was farmed during the redemption period, and is entitled to assert the same title and right of possession to the grain in question which they or either of them might have asserted thereunder had there been no foreclosure sale and by the same remedies. This contention is based upon section 5549 of the Revised Codes, which in part reads as follows: "The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." This same statute has been in force in California for many years, during which it has been repeatedly passed upon by the supreme court of that state. In *Reynolds v. Lathrop*, 7 Cal. 43, it was held that the effect of the sale was equivalent to an assignment of the lease, and that the plaintiff in ²²⁷ that case, who was the purchaser, "could sue for the rent, as often as it fell due, under the terms of the lease existing when he became purchaser." This case was followed in *McDevitt v. Sullivan*, 8 Cal. 593, which went further, and held that when the tenant had paid the rent for the redemption period to his landlord in advance, the purchaser could require him to pay it over again. In *Harris v. Reynolds*, 13 Cal. 515, 73 Am. Dec. 600, the words "tenant in possession," as used in the statute, were construed and held to include the owner who is in possession, as well as others who have possession under any kind of title. The court said: "The phrase 'the tenant in possession' is a generic term, intended to designate the class of persons from whom the purchaser was to receive the rents. The language is not, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor when in possession shall not; but the phraseology designed evidently to fix a general right applying to all cases of tenancy, for none are excluded. . . . The definition of 'tenant in possession' embraces within the natural and usual meaning of the words a judgment debtor as well as his lessee. The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of 'tenant' is 'one who holds or possesses lands or tene-

ments by any kind of title, either in fee, for life, years, or at will.'” So, too, in *Hill v. Taylor*, 22 Cal. 191, it was held that the purchaser of a mine at a mortgage foreclosure sale was entitled to the profits of the mine, which the mortgagor was working himself. That court further said, in discussing relative rights of the purchaser and original owner after sale, in *Page v. Rogers*, 31 Cal. 294: “The purchaser acquires an equitable estate in the lands, conditional, it is true, but which may become absolute by simple lapse of time, without the performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with the further right in him, and his creditors having subsequent liens, to defeat the operation of a sale already made during a period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked legal title remains in the judgment debtor, with authority in the sheriff to divest it by executing a deed to the purchaser. Even during the period which elapses between the sale and expiration of the time for redemption the statute regards the purchaser as the owner in equity, and gives him the rents and profits, or the value of the use and occupation. . . . In short, it gives him the entire beneficial interest in the property, except the actual possession.” Later, in *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723, it was held that “when real property is sold at a foreclosure sale a party to the foreclosure suit, who thereafter remains in possession under a claim of title, which is subject to the mortgage, is a tenant in possession, within the meaning of section 707 of the Code of Civil Procedure, and liable as such to account to the purchaser, in assumpsit, for the value of the use and occupation”: See, also, *Kline v. Chase*, 228 17 Cal. 596; *Knight v. Truett*, 18 Cal. 113; *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 290; *Webster v. Cook*, 38 Cal. 423.

The same question which is now presented by the appellant was before this court in *Clement v. Shipley*, 2 N. Dak. 430, 51 N. W. 414, in a form not materially different. In that case the plaintiff, as a purchaser at a foreclosure sale, was seeking to collect the rents due from the lessee, during the period of redemption, to the lessor, according to the terms of the contract existing between the parties to the lease. His right to recover was upheld, following the California cases to which we have referred. The recovery in that case was money, and was the sum fixed by the contract between the lessor and lessee as stipu-

lated compensation for the use of the property there involved. In the case at bar the compensation agreed upon for the use of the land is not money, but property, and it is the particular property involved in this suit. We do not think that this changes the principle, or militates in any way against the plaintiff's right to recover. It is true the plaintiff does not sue to recover a money judgment for "the value of the use and occupation" for the year of redemption, and very properly does not; for if he had brought that form of action against the parties who occupied the land, he would have been confronted by the contract between Ditton and Filson under which the farm was operated, which provides for the payment for its use in property, and in a particular manner. That contract, in the absence of fraud or collusion (and there was none), is binding upon plaintiff. He can demand no more from the tenant than could Ditton. Neither could Filson, the tenant, be required to pay for the use of the land any more or in different manner than he had stipulated to do. Further, the statutory right to rent during the redemption period does not limit the purchaser to the recovery of money rent. The word "rent" is comprehensive, and embraces "the compensation, either in money, provisions, chattels, or labor, received by the owner of soil from the occupant thereof": 3 Kent's Commentaries, 460; 2 Stephen's Commentaries on the Law of England, 23; Jac. & G. Landlord and Tenant, sec. 38. It is not necessary to technically classify the contract under which the land in question was farmed during the period of redemption. It is sufficient for the purposes of this case that it is the contract which fixed the compensation of the owner of the land for its use, and that the compensation so fixed is the wheat here involved. Under this contract the owner of the land could at all times maintain replevin for his share, and until division was made for the entire crop: See *Angell v. Egger*, 6 N. Dak. 391, 71 N. W. 547. We therefore hold that the plaintiff by his purchase at the foreclosure sale was substituted to the rights which the owner of the land had in the contract under which it was operated during the period of redemption, and it is not important whether it was Ditton or Edison. That contract gave the title to and right of possession of the particular wheat here involved to Ditton. To this plaintiff succeeded by his purchase at the foreclosure sale. Having then the same rights in the contract which either Ditton or Edison had, it would seem unnecessary to add that he is entitled to the same remedies which they might have had to

protect and enforce their interests in and under this contract. Those, of course, would include the right to recover the possession of the property in the manner now being pursued by the plaintiff. Our conclusion is that the facts found entitle the plaintiff to a judgment against the defendants for a return of the wheat in question, in quantity one thousand and twelve bushels, or for its value, which is found to be four hundred and four dollars and eighty cents on October 1, 1898, in case a delivery thereof cannot be had. The judgment of the district court is reversed, and that court is directed to enter judgment for the plaintiff upon its findings of fact.

BARTHOLOMEW, C. J. I fully concur in the opinion prepared by Justice Young. But deeming the question involved to be of great practical importance, and conceiving that much misapprehension prevails in the minds of the profession as well as the laity as to the exact condition of the law upon the question in this state, I wish, in concurring, to add a few thoughts to what my associate has said. A restatement of the facts is unnecessary. It is important, I think, to determine as nearly as may be the exact nature of the contract entered into between Ditton, the mortgagor, and the man Filson. If Filson was simply hired by Ditton to raise a crop upon the land, and was to receive as compensation for his labor in so doing a certain share of the crop produced, and if that be the entire scope of the contract, then, of course, Filson had no interest in the land. Ditton was the real party in possession during the year of redemption, and the plaintiff, the purchaser at the foreclosure sale, could recover nothing as against him as rent, as that word is used in the statute, because no rent had ever been agreed upon, and the owner, as tenant in possession, would be liable only for "the value of the use and occupation thereof," and the purchaser could claim title to no specific property as representing such value, and this action must fail. The result will be different if the contract made Filson the tenant in possession. I am clear that such was the intent, purpose, and effect of the contract. The form of contract used in this case is quite common in this state. It starts out by declaring: "Witnesseth, that the party of the first part [Filson] hereby agrees to and with the party of the second part [Ditton], for the consideration hereinafter named, to well and faithfully till and farm, during the season of farming in the year 1898, commencing April 1, 1898, and ending April 1, 1899, in a good

and husbandlike manner, and according to the usual course of husbandry, the following described premises." Then follow certain details of reciprocal obligations, and the contract continues: "And until all the covenants and agreements to be performed by the party of the first part shall have been fulfilled, the title and possession of all hay, grain, crops, produce, stock, increase, income, and products raised, grown, or produced on said premises shall be and remain in the party of the second part, and said party of the second part has the right to take and hold enough ³³⁰ of the crops, stock, increase, income, products that would by the division belong to said party of the first part to repay any and all advances made to him by the party of the second part, and interest thereon at eight per cent per annum, and also to pay all indebtedness due said party of the second part by said party of the first part, if any there be." The evident intent of this contract was to deprive the tenant of that which under an unrestricted lease would be his—i. e., the title to the crops produced by himself upon the land, and to vest such title in the landlord. The object of this is twofold: 1. It secures the rent in a state where landlords' liens are unknown; and 2. It secures all advances which the landlord may make to the tenant for seed grain, supplies, hired help, etc. It is of great advantage to the landlord; and in *Angell v. Egger*, 6 N. Dak. 391, 71 N. W. 547, this court said that the tenant might make such a contract, and yet the instrument remain a lease, and the relations of landlord and tenant exist. If it were the intention of the parties that Filson should have the possession and use of the land, he then by the contract acquired an interest in the land; and if the amount of the crop that should ultimately belong to Ditton, irrespective of any advances or indebtedness, was so reserved as rent, then the contract was a technical lease. It is clear to me that Filson was to possess, control, and use the land. By the contract he covenants "to commit no waste or damage on said real estate, and to suffer none to be done." This latter covenant would be impossible of performance if he had not exclusive control. Again: "It is also agreed that, in case said party of the first part [Filson] fails to perform any of the conditions and terms of this contract on his part to be done and performed, then said party of the second part [Ditton] is hereby authorized and empowered to enter upon said premises and take full and absolute control of the same." This is the usual provision for re-entry by the landlord, and can have no force unless the tenant is in possession

in his own right. Again: "This contract shall not be assignable or sublet by the party of the first part without the consent of the party of the second part." It could not be "sublet" by Filson unless it had previously been "let" to him. If it had been let to him, what he paid therefor was rent, and the contract is a lease, notwithstanding the fact that some of its provisions, standing alone, might import the contrary. Said the court in *Walls v. Preston*, 25 Cal. 60: "The character of the instrument must be determined upon the consideration of all its terms and provisions, and the court will give it such a construction as will carry into effect the intention of the parties, without regard to the technical terms employed. Although words are used which, if disconnected from other parts of the instrument, would import a lease, they will not be so construed if the evident intention was merely to make a cropping contract. Nor, on the other hand, will the instrument be so construed as to deprive the occupant of the position of a tenant of the land, if from the whole instrument it is ²³¹ apparent that the parties intended he should enjoy the exclusive possession of the premises": See, also, *Townsend v. Isenberger*, 45 Iowa, 670; *Chandler v. Thurston*, 10 Pick. 205; *Walker v. Fitts*, 24 Pick. 191. In 12 *American and English Encyclopedia of Law*, 977, it is said: "No particular form of expression or technical words are necessary to constitute a lease, but whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property, and the other shall take it, for a certain space of time, are sufficient, and will amount to a lease for years, as effectually as if the most proper and permanent form of words had been made use of for that purpose." I am aware that some courts, while not holding that contracts of this character are not leases, have yet preferred to designate them as contracts of adventure: *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Bowers v. Graves*, 8 S. Dak. 385, 66 N. W. 931. But see the remarks of *Woodruff, J.*, in *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, as to what would be the holding in New York were the question new there, as it is here. In all cases of leasing of realty for farming or commercial purposes, it is a contract of adventure, so far as the lessee is concerned. In this case there is the added uncertainty as to the value of what is to be paid for rent. But that always happens when the rent is payable in kind. When the cases speak of certainty as to the rent, they mean simply that the contract must determine what the rent

is to be, and not its value. If to be paid in a share of the crop, the contract must determine what share. I do not think that the fact that the owner of the land was in this case to hold the title to the crop destroys the contract as a lease. Rather, to my mind, it has the opposite effect. The express provision was inserted because the parties understood that if it was not inserted the title would be in the lessee, and, as stated, it was inserted as security, and to that extent the provision is in the nature of a mortgage. But it is certain that the owner intended by the contract to dispossess himself and place the tenant in possession, and that, too, not merely for the time necessary to produce a crop, but for a year certain; and during the entire term, if the tenant performed his covenants, any interference with his possession by the owner would have been a trespass. Among the results that follow at common law if the contract be considered as a lease is the fact that a conveyance of the reversion carries with it all rents under the lease which have not already become due, and ripened into a right of action for money in the hands of the lessor. In *Wood on Landlord and Tenant*, 722, it is said: "A sale of the reversion carries with it, unless expressly reserved, all rents and rights under a lease previously granted that subsequently became due, and the grantee may recover them in an action in his own name. Upon such conveyance the grantee takes the place and assumes the rights and liabilities of the original landlord. In other words, he becomes landlord as fully as though the lease had been made by himself, whether he knew all the terms of the lease or not." In *Townsend v. Isenberger*, 45 Iowa, 670, ²³² it is said: "Rent reserved by lease, and not accrued, passes by a conveyance of land to the grantee": Citing *Abercrombie v. Redpath*, 1 Iowa, 111; *Van Driel v. Rosierz*, 26 Iowa, 575. Again: "A purchaser under an execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed": Citing *Bank of Pennsylvania v. Wise*, 3 Watts, 394; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364. Where rent is payable at stated periods, as quarterly or yearly, it will not be apportioned, in the absence of an express reservation. The party holding the reversion when the rent falls due is entitled to the whole thereof. In *Bank of Pennsylvania v. Wise*, 3 Watts, 394, the premises were rented for an annual rental of four hundred and twenty-five dollars, payable half yearly. Fourteen days before a half year's rent became payable, the premises were sold under execution. The court said: "The idea of apportioning the rent that becomes

payable after the purchaser of the reversionary interest in fee at a sheriff's sale has paid the purchase money and received his deed of conveyance for it, between him and the defendant in the execution, as whose estate it was sold, is unknown to the law, and cannot be reconciled with any of its analogous and fixed principles." And in a contest between the landlord and the purchaser the latter was allowed to recover the entire half year's rent, although he purchased the property only fourteen days prior to the expiration of the half year. This case was expressly approved in *Burns v. Cooper*, 31 Pa. St. 426. This was also a case of judicial sale, where the rent was a share of the crop, and the court said: "The rent (i. e., one-half of the grain) was not payable until the crop should ripen and be harvested. If the reversion did not pass to Cooper until the 1st of April, 1856, it still passed before the rent became payable; and the principle is that rent is incident to the reversion until it becomes both debitum et solvendum. Until then it passes with the land to the heir, devisee, or purchaser, and not until then does it become personal and go to the executor. Until then it is no debt." *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312, was a case where farm lands were leased for a share of the crop, to be delivered when the crop was threshed. The farm was sold without reservation on October 1st of the year for which the farm was leased. At that time the crop was cut and stacked on the premises. It was threshed on October 24th. The court held the purchaser entitled to the entire rent: See, also, *Montague v. Gay*, 17 Mass. 439. To the several California cases cited in the main opinion as holding that the foreclosure sale operates as a conveyance to the purchaser at such sale of the entire beneficial interest of the owner, save the right of redemption, and the bare right of possession during the redemption period, the following cases may be added: *Harris v. Reynolds*, 13 Cal. 515, 73 Am. Dec. 600; *Shores v. Scott River Co.*, 21 Cal. 135; *Henry v. Everts*, 30 Cal. 425; *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 120; *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66.

I cite the foregoing authorities, not to establish the elementary principle that a voluntary conveyance of leased premises operates ²³³ as an assignment of the lease, and conveys to the purchaser full right to collect rent thereunder, but to show that such conveyance assigns to the purchaser the right and title to all rents not then due by the terms of the lease, how-

ever much they may be earned, and to show that the same principles apply to judicial or foreclosure sales. True, many of the cases speak of the payment of the purchase money and receipt of sheriff's deed as entitling the purchaser to the rents, but those cases were sales where no provision was made for redemption. The California cases deal with sheriff's certificates, and apply the same rule as in cases of deeds. Certainly nothing less can be insisted upon under our statute. Section 5538 of the Revised Codes declares: "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto," subject, as has been said, to the debtor's right of redemption, and his bare right of possession during the redemption period. With this limitation, every right, title, interest, and claim of the debtor is sold, and passes to the purchaser; in all respects, to the same extent that it would pass by a voluntary conveyance. All title to crops that was by the lease reserved in the landlord is transferred by the sale to the purchaser, and all the rights of the landlord under his lease to enforce the payment of rent inure to the benefit of the purchaser. And upon what is the underlying principle that gives to the purchaser all rents not yet due, however much they may be earned, based? It is simply that they constitute a part of the estate that is bought and paid for. They enhance the value of the estate just as certainly as would a growing crop, and just as certainly they form a part of that for which the consideration is paid. I have not seen this more clearly stated anywhere than by Kennedy, J., in *Bank of Pennsylvania v. Wise*, 3 Watts, 397: "But then to say that the lessee, even at the expiration of the half year, shall be bound to pay the rent for the last three months thereof to the purchaser, and for the first three to the defendant in the execution, would be to split up a demand into two, which by the terms of the contract giving rise to it was one and entire, and would subject the lessee to two actions instead of one, contrary to his agreement, and contrary to a well-known rule of the common law. As the lessee, however, has had the full enjoyment of the leased premises, there can be no good reason for his not paying the whole of the half year's rent as soon as it shall become payable by his lease to the party entitled to receive it. Then, seeing the purchaser has succeeded to the rights of the landlord, why shall he not receive the whole rent? The only reason of the least plausibility that can be alleged for apportioning the rent according to time

between the defendant in the execution and the purchaser at sheriff's sale, by giving one-half of it, on account of the first three months of the half year, to the defendant in the execution, and the other half, for the last three months, to the purchaser at sheriff's sale, would be to say that it did not properly and truly form any part of ²³⁴ the subject matter or estate sold by the sheriff; that the defendant in the execution had received no consideration, and the purchaser had paid none for it. But by inquiring into and ascertaining what was really sold and bought at the sheriff's sale, it will be seen that there is no ground whatever for such a suggestion, and that it is a great misapprehension of the matter to suppose it; for we shall find that the purchaser at sheriff's sale not only purchased, but must be considered as having paid for, and as being invested with, a right to demand and receive all the rents which shall become payable, according to the terms of the lease, after the time that his title to his purchase became perfect, by his payment of the purchase money, and receipt of the sheriff's deed. A right to demand and receive all such rents formed the very heart and essence of his purchase, seeing it was merely a reversionary interest." Nor does this work any hardship upon the execution or mortgage debtor. He gets the full benefit of this enhanced value. It goes to pay his debt, or is returned to him by way of surplus. I find nothing in our statute that conflicts with these well-settled principles. It says that the purchaser from the time of his purchase until a redemption is entitled to receive from the tenant in possession the rents. But the rents he is to recover for that time are the rents accruing during the period. The fact that in case of redemption all rents received must be credited upon the debt does not change the relative conditions. Redemption can be made only by paying the amount of the purchase price, with interest, as provided by statute; and the purchaser, being only required to credit the amount of rent actually received, would still have his original purchase price, with the interest. The application of these principles to the case at bar makes it clear that if, under the contract in question, the title to the crop remained in Ditton, by the purchase that interest was transferred to this plaintiff, and after the crop had been divided under the lease, and the one-half that was to be kept by the landlord as rent had been placed by itself, then plaintiff's title to such half, and to every part thereof, became absolute; and if, then, a third party, without plaintiff's knowledge or

consent, conveyed it to a point where it had an increased value, and the defendants there unlawfully detained it, plaintiff might recover the grain or its value at that point. The judgment is properly reversed. I am authorized to say that Young, J., fully concurs in these views.

WALLIN, J., DISSENTED from the holding of the court that the plaintiff secured, as purchaser of the realty at foreclosure sale, any rights which could be enforced in this kind of an action. "The purchaser as such," said Judge Wallin, "acquired no right either to the rents, or to the value of the use of the premises, during the redemption period. The right to recover is based wholly upon a statute which was expressly enacted to confer a right upon purchasers which did not exist as a result of any execution or foreclosure sale of realty. Repeal this additional statute, and no action could be maintained either for the value of the use, or to recover rent, during the period of redemption." The plaintiff, relying on a special statute, which only gives a remedy against the tenant in possession, must show that his case is within the purview of the statute. Under this statute he can sue for rent alone, and yet the defendant never rented the premises, raised the crop, or agreed to pay rent, neither does the complaint allege either a leasing or renting of the land. Plaintiff alleges ownership of the grain and seeks to recover possession solely as owner. Hence, he must establish his title to the grain. But upon the theory that he is suing by virtue of a statute which allows recovery for rent, as the prevailing opinion holds, he must recover, if at all, for rent due. The statute does not give title to any product of the soil to a purchaser at foreclosure sale. The right given by the statute to recover rent "assumes and presupposes that all the products of the soil belong to the tenant in possession. This being so, the purchaser by virtue of his purchase cannot acquire title to the products raised during the redemption period. But if the result of the action is to be determined by an adjudication upon the question of title, then it is clear to my mind that the plaintiff should not recover." The lower court found that the defendant Edison owned the grain. This finding is not impeached by the parties and the appellate court cannot disturb it. The duty of the court is clear, then, in a case where the right of possession hinges upon ownership. "It is this: Ownership of personality confers a right of possession upon the owner unless some superior right of possession." The only right to the grain claimed is that of ownership, and this being found to be in the defendants, they should have judgment.

The judge also dissented from the view that the contract in question is a lease. The contract was drawn with the intention of eliminating every advantage which accrues to a tenant. The so-called tenant did not agree to pay rent, either in money or grain;

his obligation was to produce the crop at his own expense. The owner of the property was to compensate him by giving him one-half of the crop, the title to which was at all times in the owner. There being no obligation to pay rent, this action would not lie.

The dissenting opinion further shows that the tenant, if such he were, had already paid his rent in full to the former owner of the land. This payment, being made without notice of the plaintiff's rights, exonerated him from liability. Again, upon the theory that the plaintiff is suing to recover rent, he is suing the wrong person, since under the statute he can only sue the tenant in possession. This is fatal to the plaintiff's cause of action, which should be dismissed.

MORTGAGE.—A PURCHASER AT A FORECLOSURE SALE succeeds to all the rights of the holder of the mortgage: *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 84. As to his right to crops on the premises, see the note to *Crews v. Pendleton*, 19 Am. Dec. 752-755.

A PURCHASER AT A JUDICIAL SALE of lands under a lease is substituted in the place of the landlord: *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364.

RENT CANNOT BE APPORTIONED. as a rule, if it is payable periodically: *Zule v. Zule*, 14 Wend. 76, 35 Am. Dec. 600; *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493. The party holding the reversion when the rent falls due is entitled to the entire rent, and the lessor, in case of a judicial sale of his property during the term of a lease, gets compensation for such rent as has accrued up to date, by the increased price his property will bring at the sale: *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364.

CROPPING CONTRACTS.—THE RELATION OF THE PARTIES under a cropping contract is considered in the monographic note to *Putnam v. Wise*, 37 Am. Dec. 817-823. See, also, the recent cases of *Bradley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44; *McNeal v. Rider*, 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437.

GJERSTADENGEN v. HARTZELL.

[9 N. Dak. 208, 83 N. W. 230.]

ESTOPPEL — ADMINISTRATOR'S DEED.—The deed of an administrator purporting to convey land which, under a mistake of law which is mutual to the administrator, the purchaser, and the probate court, is erroneously believed to belong to the estate, conveys no title, and cannot operate as an estoppel against the administrator or his heirs in asserting title to the property.

ESTOPPEL — ADMINISTRATOR'S DEED — PAYMENT OF DEBT TO ADMINISTRATOR.—An administrator who, upon the sale of property which is erroneously believed to belong to the estate, receives the entire proceeds in payment of a debt due him from the estate, is not estopped by such conduct, nor are his heirs, from subsequently asserting title to the property, where it appears

that at the time the land was sold he was not the owner thereof, and was entirely innocent of any belief that he would subsequently acquire an interest therein, that he had no intention to deceive any one either by executing the deed or by presenting his claim against the estate, and that he died before learning that he had acquired title to the land.

ESTOPPEL—ELEMENTS—TITLE TO LAND.—To constitute an estoppel with respect to the title of property, it must appear that the party making the admission by his declaration or conduct was apprised of the true state of his own title; that he made the admission with the intent to deceive, or with such careless and culpable negligence as to amount to constructive fraud; that the other party was destitute of knowledge of the true state of the title and of the means of acquiring such knowledge; and that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

ESTOPPEL—NATURE—LOSS TO PARTY.—An estoppel was never intended to work a positive gain to a party. Its whole office is to protect him from a loss which, but for the estoppel, he could not escape.

COTENANCY—PARTITION—IMPROVEMENTS.—AT COMMON LAW, and independent of statute, a cotenant cannot charge another with the value of improvements made upon the premises, unless they are made with the latter's consent.

COTENANCY — PARTITION — IMPROVEMENTS.—IN EQUITY, in decreeing a partition of premises, improvements made by a cotenant may be taken into consideration, even when made without consent or promise of contribution, provided they are necessary, useful, substantial, and permanent, enhancing the value of the estate.

COTENANCY—ALLOWANCE FOR IMPROVEMENTS.—In a suit to partition farm lands, a cotenant will not be allowed compensation for breaking and backsetting done by a remote grantor of such cotenant, where such improvements were made without the consent of the other cotenants, for the sole benefit of the person making them, that they were not necessary for the preservation of the estate, and that the value of the improvements were more than offset by the value of the use and occupation which the person making the improvements enjoyed during the period of his exclusive possession.

J. E. Bishop and C. D. Austin, for the appellant.

T. A. Curtiss and Morrill & Engerud, for the respondents.

272 YOUNG, J. This case was before us at a former term upon an appeal from an order of the district court striking out portions of the answer. The order striking out was sustained in part only. It was held as to certain portions that plaintiff's attack should have been by demurrer: See *Gjerstadengen v. Hartzell*, 8 N. Dak. 424, 79 N. W. 872. A demurrer was interposed, when the case went back to the district court. The present appeal is from an order sustaining the demurrer to those portions. The action is in equity to partition a quarter section of land situated in Ransom county. Plaintiffs allege

that they are the owners of twenty-six twenty-sevenths thereof; that on April 11, 1895, G. W. Van Dusen & Co., a Minnesota corporation, became the owner of the other one twenty-seventh, and thereafter claimed title to all of said land; that on August 23, 1897, in an action in the district court of Ransom county, wherein they were plaintiffs and G. W. Van Dusen & Co. was defendant, a judgment ²⁷³ and decree was rendered and entered adjudging them to be the owners of the share they now claim; that in March, 1898, thereafter, G. W. Van Dusen & Co. executed and delivered to the defendant herein a warranty deed purporting to convey to the defendant the fee simple title to all of said premises, and that the defendant now claims to own the whole of said premises. Plaintiffs ask that the land be partitioned, and if that is not found practicable, that it be sold and the proceeds divided. The defendant in his answer denies that the plaintiffs own any interest in the land, but admits his purchase from G. W. Van Dusen & Co. by warranty deed, as alleged in the complaint, and alleges that he purchased the same in good faith, for a valid consideration, and without notice. Defendant also sets forth the origin, nature, and extent of his title, and it is to these portions of the answer the demurrer is directed. So far as important, the facts alleged are substantially these: Olia Mikkleson, who had a homestead entry upon the land in question under section 2289 of the Revised Statutes of the United States, died on July 22, 1885, and before making final proof. She left surviving three children, Martin Peterson Gjerstadengen, Peter Peterson Sandvig, and Ole Peterson. The two children first named are parties plaintiff in this action. The third one, Ole Peterson, died in 1893, leaving surviving a widow and six children. With the exception of the interest of one of these children—Bradley O. Peterson—which is the one twenty-seventh conceded to belong to the defendant, the interests of the heirs of Ole Peterson are all represented by the plaintiffs in this action. In February, 1886, Ole Peterson made final proof on the land in behalf of the heirs of Olia Mikkleson. Final receiver's receipt was issued to him for them, and on December 15, 1887, a patent to the land was issued by the United States government to the heirs of Olia Mikkleson. In November, 1886, Ole Peterson was, upon his own petition, appointed by the probate court of Ransom county, and qualified as administrator of his mother's estate. This land was inventoried as part of the estate. In December of that year he petitioned for an

order to sell the land in question to pay the debts of the estate, which amounted to about sixteen hundred dollars. Pursuant to an order of the probate court authorizing and directing such sale, Ole Peterson, as administrator of his mother's estate, sold said land at public auction to one Peter P. Burtness, for one thousand dollars. This sale was confirmed by the probate court on March 7, 1887, and on the same day Ole Peterson, as administrator, in pursuance of an order then made and so directing him, executed and delivered an administrator's deed to Burtness. On the same day Burtness gave a deed to Bradley O. Peterson, who is one of the six children of the administrator. On October 4, 1887, Bradley O. Peterson deeded the land to David H. Buttz. On April 11, 1895, Buttz deeded to G. W. Van Dusen & Co., and on December 7, 1897, the latter deeded to this defendant. All of said deeds were placed of record.

The demurrer interposed by plaintiff to the foregoing, and also ²⁷⁴ to certain other portions of the answer, to which we shall have occasion to refer later, is that they "do not state facts sufficient to constitute a defense or counterclaim, and the defendant is barred and estopped from alleging said matters, because the same have been litigated and determined in the action in which judgment was entered in the case of *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233, mentioned and described in the complaint." The question as to whether the defendant is estopped from relitigating issues which were or might have been litigated and determined in the action against his immediate grantor is argued at length, and with much learning, by counsel for both parties. This question from the defendant's standpoint is entirely preliminary to a consideration of the merits of his defense. Should we conclude that he is not estopped from asserting them, the question would still remain for determination whether sufficient facts are alleged in the portions of the answer attacked by the demurrer to constitute a defense or counterclaim. Inasmuch as we have concluded that they are not sufficient we shall assume, without deciding the point, and only for the purposes of this opinion, that the defendant is in a position to avail himself of the defense he pleads, and will, therefore, consider the demurrer on its merits. It is apparent upon bare inspection that the defendant did not obtain title by virtue of the deeds which he sets forth as the source of his title. It will be noticed that the chain of title

in which the conveyance to him stands begins with the estate of Olia Mikkleson. She had no title, and her estate had none. Whatever right she had under her homestead entry terminated at her death, and the title to the land, which rested in the United States government until the patent was subsequently issued, when it finally passed, passed directly not to Olia Mikkleson, or to her estate, but to her heirs individually, as new homesteaders, entirely independent of administration proceedings. Neither did the deed which Ole Peterson executed estop him, or his heirs, who are now asserting interests derived from him, from asserting title to the land in dispute. The deed executed by Ole Peterson to Burtness was executed as administrator, and without personal covenants. He did not assume to convey anything more than the estate had. In fact, the estate had no title or interest. Neither did Peterson, at the time of the execution of the deed, have title. It was more than nine months afterward that the patent was issued which gave him title. The facts were not concealed, but were, on the contrary, open to all parties equally. It is plain that there was merely a mistake of law, which was mutual to the administrator and the purchaser, Burtness, and the probate court as well, in believing that the estate of Olia Mikkleson had title, whereas in fact her entire interest had ended at her death, and the title was then, and for some time thereafter, still in the United States government. We are of the opinion that the deed conveyed no title, and further, that it cannot operate as an estoppel against the assertion of the legal title by plaintiff under such circumstances. The same facts were before this court in *Gjerstadengen v. Van Duzen*, 275 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233, and the same conclusion reached. Corliss, C. J., speaking for the court, said: "The facts were all matters of public record. It appeared that Olia Mikkleson had made a homestead entry on this land, but that she had not received a patent, or earned the right thereto, at the time of her death. Whether, under these circumstances, she had such an interest in the land as would make it a part of her estate on her death was purely a question of law. Ole Peterson did not make to the purchaser any representations as to the law governing the question of title. He merely proceeded under a misapprehension as to the law, which the purchaser appears to have shared, that the land did constitute a part of the estate of the decedent, but he did not covenant that this was so. Nor does the law imply against him such a

covenant. The exact reverse is the case. The law declares that the purchaser must see to it, at his peril, that the proceedings are legal, and that the land does in fact form a part of the decedent's estate." Upon the face of the deeds from which the defendant claims title it appears that no title was conveyed; further, an estoppel by deed is not made out.

There is, however, an element in the present case which did not appear in the case of *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233. In addition to the claim made in that case that Ole Peterson and his heirs are estopped by the administrator's deed from asserting title, he also claims an estoppel by conduct, and in this connection alleges that the one thousand dollars which was paid to Peterson, as administrator, upon the sale to Burtness, was all received by Peterson in partial payment of a claim which he held and had filed against his mother's estate; further, that at the time of purchasing the land from Van Dusen & Co., the defendant "believed that the said Ole Peterson sold and conveyed the whole of said premises to said Burtness by a fee simple title thereto, and that the said Peterson received the sum of one thousand dollars from such sale, and that he applied the same to the partial payment of his said claim against said Olia Mikkleson"; further, that neither Peterson nor the heirs of Olia Mikkleson have returned or offered to return said sum of one thousand dollars, and that he was thereby induced to purchase said premises. Do these facts constitute an estoppel in pais? We are of the opinion that they do not. The end sought to be effected is to defeat the title to land. Such a result may follow upon a proper state of facts, but only when it is necessary to prevent fraud "against which the injured party could not guard by the exercise of proper diligence." We agree with the court in *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157, that "the doctrine of estoppel in pais should not be too readily extended when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute which makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statutes was to render estates secure." The rule as to the requisites of an estoppel in pais as applied to the title to realty which appeals to us as the most equitable to all parties ²⁷⁶ is that announced by Field, J., in *Boggs v. Merced Min. Co.*, 14 Cal. 367. He said: "It is undoubtedly true that a party may in many instances be

concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said in such cases to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property it must appear: 1. That the party making the admission by his declaration or conduct was apprised of the true state of his own title; 2. That he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; 3. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved. . . . There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property, and transfer its enjoyment to another." This was followed and approved in *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157, and *Smith v. Penny*, 44 Cal. 161, with the single modification of the third condition, which was held not to mean that a person must be destitute of all possible means of acquiring knowledge of the true state of the title, "but rather of all convenient and ready means to such end." Tested by this rule, the facts pleaded utterly fail to create an estoppel. Peterson was ignorant of the true state of the title when the acts set up occurred. The title was in fact then in the government. When the administrator's deed was executed, and when, as a creditor of the estate, he received payment upon his claim from moneys derived by the estate from the sale of the land, he did not own the land, and was entirely innocent of a belief that he would subsequently acquire an interest; and it is equally clear from the facts pleaded that Peterson had no intention to deceive anyone either by executing the administrator's deed or by presenting his claim against the estate to the probate court, and receiving thereon such sums as that court undertook to distribute to creditors which were derived from the sale of property which was believed, although mistakenly, to belong to the estate. Indeed, it would appear from the facts set forth in the answer that Peterson died without learning that he acquired title to this land, for the litigation based upon that question was not commenced until 1897, and was not concluded by the decision of this court in *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233,

until January, 1898, which was more than five years after Peterson's death. It is extremely doubtful whether the fact that Peterson had received this money upon his account warrants the inference that he and his heirs made no claim to the title of the land from the sale of which it was derived; yet, construing it as an absolute admission that he had no title, it was an admission made without knowledge of his title, and without intent to deceive. Again, the answer contains no allegation that the defendant will suffer loss ²⁷⁷ if he is not allowed to defeat the plaintiff's legal title by an estoppel. It is well settled that "a party setting up an estoppel must always show as an essential part of his case that he will be subjected to loss if he cannot set up the estoppel. There is no presumption in his favor. . . . An estoppel was never intended to work a positive gain to a party, but its whole office is to protect him from a loss which, but for the estoppel, he could not escape": *Townsend Sav. Bank v. Todd*, 47 Conn. 190. In view of the fact that the answer admits that the defendant received a warranty deed purporting to convey title in fee simple, and that no fact is alleged or appears which shows that his grantor is not financially responsible, we are unable to understand how the defendant will suffer loss by permitting Peterson's heirs to assert their title. On this point, see *Townsend Sav. Bank v. Todd*, 47 Conn. 218. The estoppel in pais here set up was urged in a petition for a rehearing in this court in *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233, but the facts upon which it was based did not appear in the record then before the court, and was accordingly not passed upon.

The answer also alleges that Buttz made improvements on the land during the time he possessed it, which was from 1887 until 1895, consisting of breaking and backsetting, of the value of six hundred and fifty dollars, and asks that, in the event of a partition, the plaintiffs should account to the defendant for the value of such improvement. The demurrer to this claim was also sustained, and properly so. At common law, and independent of statute, a cotenant cannot charge another with the value of improvements made by him upon the premises, unless they are made by the latter's consent: *Sedgwick & Wait's Trial of Title to Land*, 2d ed., sec. 711. In equity, however, in decreeing a partition of the premises, improvements made by a cotenant may be taken into consideration, even when made without consent or promise of contribution,

"provided they are necessary, useful, substantial, and permanent, enhancing the value of the estate": See *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, and note, 21 S. E. 746, 29 L. R. Ann. 449, and cases cited under note "c"; and each case depends upon its own facts, and the right does not exist in all cases: *Curtis v. Poland*, 66 Tex. 511, 2 S. W. 39. The facts of this case do not appeal to us as calling for equitable interference. The improvements were not made by the defendant, but by a remote grantor—some ten years before the defendant's purchase; and while it may be admitted that a warranty deed may pass the claim of a cotenant for improvements to his grantee, yet it is far from clear that such was the understanding of the parties to the various conveyances through which defendant's interest comes. Then, too, the improvements made were evidently for the exclusive benefit of the cotenant, who made them in rendering the occupancy more valuable to him. Incidentally, they may have enhanced the value of the estate. But the prime purpose in making them was to obtain personal profit, and not to increase the value of the land. Further, it appears that the party who made the improvements had the possession and use of the land and benefit of the improvements for more than seven years. It is evident that the ²⁷⁸ value of these improvements, even if they are such as could be charged to his cotenants, is more than offset by the value of the use and occupation which he enjoyed during that period: See *Cosgriff v. Foss*, 65 Hun, 184; 19 N. Y. Supp. 941; *Scott v. Guernsey*, 48 N. Y. 106. Further, such improvements were not necessary for the preservation of the estate, and the mere fact that they enhanced the value of the common property does not entitle the tenant making them to an allowance for that value: *Elrod v. Keller*, 89 Ind. 382.

The order sustaining the demurrer is affirmed.

All concur.

PROBATE SALE OF STRANGER'S LAND.—An order of a probate court for the sale of land of a third person to pay the debts of the decedent is void for want of jurisdiction over the property, even if the real owners are parties and contesting the question of title: *Gjerstadengen v. Van Duzen*, 7 N. Dak. 612, 66 Am. St. Rep. 679, 76 N. W. 233. See, too, *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702.

TO CONSTITUTE AN ESTOPPEL IN PAIS, there must be a false representation or concealment of known material facts, made to a party ignorant of their truth or falsity, and made with the intent that the latter party should act upon them, and he must have so acted: *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307, 10 S.

W. 301. See, too, *Priewe v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780.

ESTOPPELS ARE PROTECTIVE ONLY.—Their operation should be limited to saving harmless or making whole the person in whose favor they arise, and they should never be made the instruments of gain or profit: *Lindsay v. Cooper*, 94 Ala. 170, 33 Am. St. Rep. 105, 11 South. 325.

COTENANCY—IMPROVEMENTS.—At the common law, a tenant in common could not recover from his cotenants for improvements, unless they were made at the request or with the consent of the latter: *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, 46 N. E. 307. See, further, the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 934-937.

PARTITION—IMPROVEMENTS.—If property held in cotenancy is not susceptible of division, the court may order an account before partition, and provide for a suitable compensation for improvements to the tenant making them: *Holt v. Couch*, 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703. See a further discussion of this subject in the extended note to *Ward v. Ward*, 52 Am. St. Rep. 937-941.

DAKOTA INVESTMENT COMPANY v. SULLIVAN.

[9 N. Dak. 303, 83 N. W. 233.]

JUDGMENT—PRESUMPTION OF PAYMENT—CHANGE OF LAW—EXECUTION.—A disputable presumption is a mere rule of evidence, in which a party can have no vested right, and which may be changed at the will of the legislature. Hence, where the law, at the time a judgment was rendered, raises a disputable presumption of payment after five years, and forbids execution thereon after such time without leave of court, the law may be changed so as to permit execution at any time without leave of court, and it will apply to existing judgments.

EXECUTION—FAILURE TO COMPLY WITH STATUTE—VOIDABLE.—An execution issued after the lapse of the statutory period, without taking the steps prescribed by statute, is voidable in itself, and not void, and all acts done under it before it is set aside are valid.

EXECUTION SALE—CONFIRMATION—ATTACKING FOR IRREGULARITIES—APPEAL.—An order confirming an execution sale is a final order which is appealable, and the remedy of a party aggrieved thereby is by appeal, a failure to do which forever precludes him from attacking the judgment of confirmation on the ground of mere irregularities.

De Puy & De Puy, for the appellant.

Gray & McMurchie, for the respondents.

304 **BARTHOLOMEW, C. J.** On the twenty-ninth day of January, 1897, an execution was duly issued by the clerk of the district court of Walsh county upon a judgment thereto-

fore duly and regularly entered in said court in favor of the Dakota Investment Company and against Timothy Sullivan. The judgment was dated October 25, 1889. Such proceedings were had under the execution that on March 15, 1897, the sheriff of said county sold certain real estate in said county that belonged to said Sullivan at the time of the entry of judgment, and upon which the judgment was a lien. The property consisted of four town lots—two adjoining lots in one block, and two adjoining lots in another block. The lots in each block were sold to different purchasers. On the sixteenth day of March, 1897, the sale was duly confirmed. There is no claim made that there was any fraud used in obtaining this confirmation, or that there was any accident or surprise upon the part of any interested party. On July 8, 1899 (being more than two years after the order confirming the sale was entered), one J. W. Boeing, who had become interested in a portion of the land sold, as assignee of the sheriff's certificate of sale, gave notice of a motion to set aside the said sheriff's sale, and to cancel and annul the satisfaction of judgment theretofore entered, and to have the lien of the judgment re-established and another sale ordered. This notice was served upon the parties to the original action, the purchasers at the sheriff's sale and one William J. Hewitt, who held the record title to a portion of the land through conveyances from Sullivan. Hewitt alone appeared and opposed the motion. The relief asked in the motion was in part granted, and Hewitt appeals.

The first error assigned reads: "The court erred in entertaining a motion on the part of respondent to vacate the sale." We shall rule the case upon this assignment. We first consider the grounds upon which the motion was based, and in doing so we must look at the grounds set forth in a prior motion made by Hewitt, as they are referred to and made the basis in part for this motion. When the judgment was rendered, section 5111 of the Compiled Laws was in force, under which an execution could not issue upon a judgment after five years from its rendition, without leave of court; and this could be had only upon a showing that the judgment, or some portion thereof, remained unpaid. In other words, the law raised a disputable presumption of payment after five years. No leave of court was obtained in this case, although the execution was not issued until seven years after the rendition of judgment. This is urged as ground for setting aside the sale. But section

5111 of the Compiled Laws ³⁰⁵ was omitted from the Revised Codes of 1895, and at the time the execution was issued there was no limit thereon, save the life of the judgment. True, the five years from the rendition of the judgment had expired before section 5111 of the Compiled Laws was repealed; but a disputable presumption is a mere matter or rule of evidence, in which a party can have no vested right, and which may be changed at the will of the legislature. The rule having been swept away, no leave of court was necessary when the writ issued. But if necessary, its omission was an irregularity only, and did not render the sale void. In 8 Encyclopedia of Pleading and Practice, 360, it is said: "An execution issued after the lapse of more than a year and a day after judgment, without revival by scire facias, or after the lapse of the statutory period, without taking the steps prescribed by statute, is voidable merely, and not void, and all acts done under it before it is set aside are valid." An immense array of cases is cited in the notes to support the text.

The other objections to the sale relate to the time for which the property was advertised, and the sale of two lots for a lump sum; that is to say, irregularities on the part of the officer conducting the sale. In this state, execution sales of real estate must be confirmed by the court whence the execution issued: Rev. Codes, sec. 5539. As already stated, the sale was duly confirmed in this case, and this attack is made nearly two years after confirmation. In 12 American and English Encyclopedia of Law, 219, it is said: "In confirming the sale, the court decides on its legality; and this adjudication supplies all defects in the proceedings, except in case of fraud or lack of jurisdiction." In Kleber on Void Judicial and Execution Sales, 387, it is said: "Where execution sales are required by statute to be confirmed, the same rule then applies to them as is applicable to judicial sales—namely, that in the absence of fraud the order of confirmation cures all defects and irregularities in the sale, and the purchaser acquires all the title of the judgment debtor. Objections to the sale for errors and irregularities not of a jurisdictional nature must be urged before confirmation, or else they are too late." In *Brown v. Gilmor*, 8 Md. 322, the sale was attacked by motion after confirmation, or, as it is there termed, "ratification." After disposing of certain objections relating to the transfer of the case from one court to another, the court said: "Unless, therefore, there was some other cause which prevented the pur-

chaser from making his objections to the ratification of the sale within the time limited by the order nisi, such as misrepresentation, surprise, or fraud on the part of the trustees or other parties interested, the ratification by the superior court of Baltimore must be regarded as final and conclusive." In Freeman on Executions, section 311, it is said: "Such objections to a sale as can be asserted in that manner ought to be made by opposition to its confirmation; for if not made thus, or if made thus and overruled, the order of confirmation seems to have the ³⁰⁶ force of a judgment, and to estop the parties from any collateral assertion of the alleged irregularities." In Kincaid v. Tutt, 88 Ky. 396, 11 S. W. 299, the court said: "So the judgment of confirmation being distinct from the judgment on the cause of action, and final, it follows that it cannot be vacated after the term of court at which it was rendered." Watson v. Tromble, 33 Neb. 450, 29 Am. St. Rep. 492, 50 N. W. 331, was an action in equity to set aside a sale by reason of irregularities in the appraisement. The court said: "The plaintiff, Watson, was a party to the foreclosure suit, and should have urged his objections to the appraisement before the confirmation of sale. No excuse is given for his not having done so, nor is there any charge of fraud or collusion. No fraud being alleged, it must be held that the order of confirmation cured all defects and errors in the appraisement and sale, and that the purchaser acquired all the title of the judgment debtor in the property": Citing Neligh v. Keene, 16 Neb. 407, 20 N. W. 277; Wilcox v. Ruben, 24 Neb. 368, 8 Am. St. Rep. 207, 38 N. W. 844. And see, also, Hotchkiss v. Cutting, 14 Minn. 537; Willamette Real Estate Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800, 42 Pac. 514; McRae v. Daviner, 8 Or. 63; Dawson v. Litsey, 10 Bush, 408; Crawford v. Tuller, 35 Mich. 57; Farmers' Bank v. Peter, 13 Bush, 591; Thomas v. Davidson, 76 Va. 338; State Nat. Bank v. Neel, 53 Ark. 110, 22 Am. St. Rep. 185, 13 S. W. 700.

The order of confirmation, being a final order made upon summary application in an action after judgment, affecting a substantial right, is appealable, under the express provisions of section 5626 of the Revised Codes, and such an order has been held a final, appealable order: State Nat. Bank v. Neel, 53 Ark. 110, 22 Am. St. Rep. 185, 13 S. W. 700; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607; Yerby v. Hill, 16 Tex. 377; Hirshfield v. Davis, 43 Tex. 155. If,

respondent was in any manner aggrieved by the order of confirmation, his remedy was by an appeal therefrom. Having failed to appeal, he is forever precluded from attacking the judgment of confirmation on the ground of irregularities. This application was made by one not a party to the action. We have assumed that he could attend the sale in a proper manner, but must not be understood as so deciding. The court was without authority to entertain the motion on the grounds alleged, and the order from which the appeal is taken must be reversed.

All concur.

EXECUTION ON A DORMANT JUDGMENT is irregular merely, and not void: *Sherrard v. Johnston*, 193 Pa. St. 166, 74 Am. St. Rep. 680, 44 Atl. 252. Execution issued without leave after the lapse of five years is not void, but only liable to be set aside on motion: *Aultman etc. Co. v. Syme*, 103 N. Y. 54, 79 Am. St. Rep. 565, 57 N. E. 168.

THE ISSUING OF AN EXECUTION IS GOVERNED BY THE LAW in existence at the time of its issuance: *Aultman etc. Co. v. Syme*, 103 N. Y. 54, 79 Am. St. Rep. 565, 57 N. E. 168.

AN ORDER CONFIRMING A JUDICIAL SALE is a final and conclusive judgment, and it has the effect of curing irregularities leading up to the sale: See the monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495. Consult, also, *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369, 57 Pac. 110.

HENNIGES v. PASCHKE.

[9 N. Dak. 489, 84 N. W. 350.]

DEEDS—DESIGNATION OF GRANTEE.—A deed of real estate, to be effective as a conveyance, must designate a grantee; but it is not indispensable that the grantee's name should be stated, if the instrument so identifies him that there is no reasonable doubt respecting the party constituted grantee. Hence, a deed which recites that the consideration was paid by a named person, sufficiently designates him as the grantee, and is valid.

MORTGAGES—ASSIGNMENT OF—FAILURE TO RECORD—BONA FIDE PURCHASER—MAXIM.—When one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong. Hence, a purchaser of real property for value who acted entirely in good faith, relying on the record title in making the purchase, is protected as against a bona fide purchaser of promissory notes secured by a mortgage on the same property, who has neglected to take and place on record an assignment of the same.

CONVEYANCES — ASSIGNMENT OF MORTGAGE — FAILURE TO RECORD.—An assignment of a real estate mortgage is a conveyance which should be placed on record, and a failure to record it renders it void as to subsequent purchasers or encumbrancers of the mortgaged premises in good faith and for a valuable consideration whose conveyances are first recorded.

J. E. Gray, for the appellant.

Cochrane & Corliss, for the respondent.

⁴⁹³ **YOUNG, J.** This is an action to foreclose a real estate mortgage. The mortgage in question was given by John Johnson, one of the defendants herein, to one John P. Walker, to secure his eight promissory notes of even date therewith. It was placed on record on June 28, 1895, the day it was executed. Four of the notes were for five hundred dollars each, and matured, respectively, on November 1, 1895, 1896, 1897, and 1898. The remaining four notes were for one thousand dollars each and matured, respectively, on November 1, 1899, 1900, 1901, and 1902. All of the notes were transferred to plaintiffs before maturity, ⁴⁹⁴ and are unpaid. No written assignment of the mortgage was executed by the mortgagee to plaintiffs. Their rights in the mortgage arise from their ownership of the debt secured thereby. They seek also to have the title of the defendant Paschke, who claims to be a good faith purchaser of the mortgaged premises, declared subject to the lien of the mortgage. The defendants Johnson and Walker did not answer. The answer of Paschke presents the only issues in the case. His answer, in effect, is that he is a good faith purchaser of the mortgaged premises under the recording laws of this state, and that his title is, therefore, freed from the lien of the mortgage in suit. His claim is that when he purchased the land there was nothing of record to apprise him of the fact that plaintiffs had any interest in the mortgage, and that he purchased and paid for the mortgaged premises in reliance upon the record title, and received from his vendor a proper satisfaction of the mortgage in suit, executed by the record owner thereof. The trial court sustained his defense, and entered judgment declaring the mortgage void as to him, and confirming his title to the premises. Plaintiffs appeal from this judgment, and request a retrial of certain specified facts.

The facts upon which the case turns are in the main undisputed. Appellants urge two grounds in support of their

contention that the lien of the mortgage is a paramount and first lien, and is not invalid as to Paschke, as found by the trial court: 1. It is claimed that by reason of a defective deed in Paschke's chain of title he is without any title or interest in the premises whatever; 2. It is contended that, even if this deed is good, and he obtained title, nevertheless he is not a good faith purchaser, and therefore took subject to plaintiffs' mortgage. Before considering these questions—and they present the only questions in the case—it will be necessary to state certain preliminary facts. It is agreed that Johnson was the fee simple owner of the real estate in controversy when he executed the mortgage; also that the mortgage remained of record, and was unsatisfied, on December 24, 1898, when Paschke purchased the premises. The series of conveyances in his chain of title were all of record, and are as follows: A deed from Johnson to John P. Walker, dated October 30, 1895; a deed from John P. Walker to F. T. Walker, dated September 10, 1898; a deed from F. T. Walker and wife back to John P. Walker, dated November 17, 1898. Defendant Paschke purchased from John P. Walker, and his deed bears date December 21, 1898, but was not delivered until three days later. The record also showed the following transfers of the Johnson mortgage: An assignment from John P. Walker to John L. Cashel, trustee, dated November 27, 1897, and an assignment from John L. Cashel, trustee, to F. T. Walker, dated September 21, 1898. Under date of November 17, 1898, F. T. Walker, the record owner of the mortgage, executed a satisfaction thereof which was delivered to the defendant Paschke when he purchased the premises on December 24th thereafter. Paschke relied entirely upon record title, and had no actual notice that plaintiffs either had or claimed any right or ⁴⁹⁵ interest in the mortgage in suit. The record showed that John P. Walker owned the land, and that F. T. Walker owned the mortgage. We now turn to the contention that Paschke has no title by virtue of his purchase. Appellants contend that the deed from F. T. Walker and wife to John P. Walker, defendants' grantor, is entirely void, and conveyed no title. So much of it as is important for the purposes of construction is as follows: "Know all men by these presents, that I, F. T. Walker, and Maggie J. Walker, his wife, of Sioux county, and state of Iowa, in consideration of the sum of one thousand (\$1,000) dollars in hand paid by John P. Walker, of Walsh county, North Dakota, do hereby quitclaim unto the said ———, all right, title, and interest in and to the

following described premises," etc. The objection to this instrument is that it does not designate a grantee. If this is true, it is without validity and effect, for it is an undoubted rule of law that a deed of real estate, to be effective as a conveyance, must designate a grantee; otherwise no title passes. The designation of a grantee is just as necessary to the validity of the grant as the designation of the grantor and the description of the property. 9 American and English Encyclopedia of Law, 132, states the rule as follows: "The deed must designate the grantee; otherwise it is a nullity, and passes no title. If not named, the grantee should be so described as to be capable of being ascertained with reasonable certainty; and, if named, the name should be sufficient to identify the person intended, though it need not, as matter of law, be accurate in every respect." Numerous authorities have been cited by counsel in support of their construction of the deed under consideration, among which are *Vineyard v. O'Connor*, 90 Tex. 59, 36 S. W. 424; *Bay v. Posner*, 78 Md. 42, 26 Atl. 1084; *Mardes v. Meyers*, 8 Tex. Civ. App. 542, 28 S. W. 693; *Newton v. McKay*, 29 Mich. 1; *Hardin v. Hardin*, 32 S. C. 599, 11 S. E. 102; *Allen v. Allen*, 48 Minn. 462, 51 N. W. 473; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517. These cases are in point only so far as they declare general rules of interpretation. In none of them was the deed being considered identical in language with that before us. It is a general rule applicable to all written instruments that courts, in construing them, will, when possible, adopt a construction which will give effect, rather than one which defeats them. This maxim of interpretation is embodied in section 5103 of the Revised Codes. The Michigan court, in *Newton v. McKay*, 29 Mich. 1, a case quite similar to the case at bar, uses this language: "It is undoubtedly true that, to constitute a valid conveyance, the grant must in some way distinguish the grantee from the rest of the world. But it is equally true that if, upon a view of the whole instrument, he is pointed out, even though the name of baptism is not given at all, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English, or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties through the means furnished by the whole document and such extrinsic aids as the law ⁴⁰⁶ permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If

the instrument shows who he is, if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument." In the above case the grantor was named as party of the first part, and one Genereaux as party of the second part. The grantee's name did not appear in the granting clause. It was held that, inasmuch as no other name appeared in the instrument, Genereaux was sufficiently designated as grantee. The language which we have quoted from the opinion was expressly approved in *Vineyard v. O'Connor*, 90 Tex. 59, 36 S. W. 424, and it states a generally accepted rule of construction. Tested by the foregoing, does the deed in question designate a grantee? We are clear that it does. It recites that the consideration was paid by John P. Walker. That fact alone raises a very strong, but perhaps not a conclusive, presumption that he was intended as grantee. But we do not rest our conclusion on this presumption. But three persons are named in the deed. The first two—F. T. Walker and Maggie Walker—are grantors. The other person named is John P. Walker. The deed, after reciting that the consideration is paid by John P. Walker, declares that the grant is "unto said _____"; that is, to some person or persons therefore named. The only person to whom it can possibly refer is John P. Walker, for the grantors could not convey to themselves, and no other persons are named. Through a clerical omission Walker's name was not repeated in the blank in the granting clause, but he had already been named, and, had the blank been filled, no other name than his could have been inserted. The language, as it stands, forbids it. Our conclusion is that the deed designates John P. Walker by name as grantee with entire certainty, and is, therefore, a valid instrument.

We will next consider whether the defendant is a good faith purchaser in the sense that his title is protected against the lien of the mortgage in suit. It appears that the negotiations which resulted in the purchase of the premises by defendant extended through three days, and that Walker, the vendor, was at all times the moving party in the transaction. The several propositions for the sale of the property came from him. On the day prior to the consummation of the sale he executed and placed on record a deed to defendant Paschke, and provided a

certified abstract of title showing the title as we have described it. This, together with a satisfaction of the mortgage in suit, was exhibited to Paschke to show that the title to the premises which he was about to purchase was good, and was unencumbered by the Johnson mortgage. The defendant, because of his ignorance of the English language, was not capable of examining the abstract himself, and so employed counsel to do so. After being advised that the title was good, and not before, he paid the purchase price, received his deed, and also the satisfaction of ⁴⁹⁷ the Johnson mortgage. It is entirely clear that he acted in good faith, and that he had no actual knowledge that plaintiffs were interested in the premises in any way, and that he relied upon the record title in making this purchase. Considerable evidence was introduced for the purpose of showing that the land was worth more than defendant paid for it. The conflict on this point we need not determine. It is unimportant. It is true that Walker was engaged in perpetrating a fraud, but it is entirely clear that defendant was not in collusion with him, and that he acted in good faith. Under such circumstances, the fact that he made a good bargain—if that is the fact—would not authorize us to deprive him of its fruits: See *Heyrock v. Surerus*, 9 N. Dak. 28, 81 N. W. 36. Under this state of facts, which party to this litigation must bear the loss—plaintiffs, who are the innocent purchasers of the notes secured by the mortgage, or defendant Paschke, who in good faith and without actual knowledge of plaintiffs' rights, purchased the mortgaged premises? Both upon principles of equity and under the statutes of this state, plaintiffs must bear the loss, and this for the reason that by not taking and recording an assignment of the mortgage they made the commission of the fraud possible. This has been held in states where the recording of assignments was not compulsory: See *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 380, in which the court, speaking through Wright, J., said: "A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of the debt, and however honest the purpose, is liable to untold abuse. They ought, therefore, to be made a matter of public record. The spirit, if not the very letter, of our recording law requires it. Such a requirement can work no possible hardship, while the contrary rule can only be attended by evil, and that continually. Parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived

by appearances without a record to guide them." This is upon the general principle "that, when one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong": *McClure v. Burris*, 16 Iowa, 591; *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37; *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. Rep. 814. And it is generally held that statutes which have for their purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of the registry laws, which enable him to give notice to all the world of his claims, to the claims of a subsequent purchaser who acted on the faith of the public record: *Kenyon v. Stewart*, 44 Pa. St. 179; *Jackson v. Lamphire*, 3 Pet. 288; *Connecticut etc. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586. Again, plaintiffs are under the ban of the statute as well as of judicial authority. Section 3594 of the Revised Codes provides that "every conveyance of real property other than a lease for a term not exceeding ~~one~~ one year is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof in good faith and for a valuable consideration, whose conveyance is first duly recorded." An assignment of a real estate mortgage is included in the term "conveyance" used in the section quoted, and is an instrument required to be placed on record. This section is a re-enactment of section 3293 of the Compiled Laws, and has been repeatedly construed by the supreme court of South Dakota, where it has continued in force, and held that an unrecorded assignment of a mortgage is void as to subsequent purchasers or encumbrancers of the mortgaged premises in good faith and for a valuable consideration whose conveyances are first recorded. In *Merrill v. Luce*, 6 S. Dak. 354, 55 Am. St. Rep. 844, 61 N. W. 43, an assignment had been executed, but not recorded. In *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958, there was merely a transfer of the notes, as in the case at bar. The same was true in *Pickford v. Peebles*, 7 S. Dak. 166, 63 N. W. 779. In each case it was held that the failure of the purchaser of the notes to record an assignment of the mortgage defeated his right as against innocent purchasers, and such is the holding of all courts where a similar statute is in force: *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614. See cases cited in *Merrill v. Luce*, 6 S. Dak. 354, 55 Am. St. Rep. 844, 61 N.

W. 43; also in *Windle v. Bonebrake*, 23 Fed. 165. Plaintiffs neglected to take and record an assignment. Defendant purchased in good faith and for a valuable consideration. It follows, therefore, both upon equitable principles and under section 3594 of the Revised Codes, that plaintiffs cannot enforce their mortgage against the title he acquired by such purchase. The judgment of the district court is affirmed.

All concur.

A DEED NEED NOT GIVE THE NAMES OF THE GRANTEEES if it otherwise so describes them that they can be ascertained and identified: *Lady Superior v. McNamara*, 8 Barb. Ch. 375, 49 Am. Dec. 184.

AN ASSIGNMENT OF A MORTGAGE IS A CONVEYANCE within the meaning of recording acts, and must, therefore, be recorded in order to charge subsequent purchasers with notice thereof: *Swasey v. Emerson*, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426, and note.

OLSON v. O'CONNOR.

[9 N. Dak. 504, 84 N. W. 359.]

TRIAL—EVIDENCE OF OWNERSHIP—CONCLUSION OF WITNESS.—When ownership is a material fact to be determined in an action, and the answer of a witness as to ownership involves his construction of facts or his conclusions as to what they establish, it is error to permit him to testify to the ultimate fact of ownership; but if a direct answer is subsequently qualified by a statement of the facts relative to it, and discloses the facts upon which the answer is based, the error is cured, and is not ground for reversal.

TRIAL—EVIDENCE OF OWNERSHIP—DIRECT TESTIMONY OF WITNESS.—Ordinarily, the title to property is a simple fact, to which a witness having the requisite knowledge can testify directly. Hence, in an action to recover damages for the conversion of property, a witness may testify directly, in the first instance, who owned the property, where he is personally familiar with all the facts so that he can do so positively, and not as a mere opinion.

HUSBAND AND WIFE—TRANSFER OF HOMESTEAD TO WIFE—EFFECT ON CREDITORS.—The conveyance of a homestead by a husband to his wife cannot be in fraud of creditors, either as to the land itself or as to crops subsequently produced thereon by the wife.

HUSBAND AND WIFE—WIFE OWNING LAND—TITLE TO CROPS.—Where a wife is the owner of land and entitled to its use, the crops grown thereon are, presumptively, hers, and the right of her husband to crop the land must be founded upon a transfer to him of such right in some form which the law would recognize as having that effect.

HUSBAND AND WIFE—HUSBAND MANAGING WIFE'S PROPERTY—TITLE TO PROFITS.—The gratuitous contribution of a husband's time and skill to the management of his wife's property creates no title to its profits or increase in him. The mere fact that a husband gratuitously devoted his labor and time to producing a crop on his wife's land has no legal efficacy to vest the title of such crop in him.

John A. Sorley, for the appellant.

George A. Bangs, for the respondents.

505 **YOUNG, J.** Action in conversion to recover the value of a quantity of grain. Plaintiff claims as owner, and alleges that the grain in controversy was raised by her in 1896, and upon land of which she was the owner. Defendants admit the taking and quantity and value of the grain, but allege as a complete defense that the same was not the property of the plaintiff, but was owned by Albert G. Olson, plaintiff's husband, and that the same was taken by the defendant O'Connor, as sheriff of Grand Forks county, under and **506** by virtue of certain claim and delivery proceedings which were based upon a chattel mortgage thereon executed and delivered by the said Albert G. Olson, the defendant in said claim and delivery action, to Andy Jones, the plaintiff therein. Jones is joined as defendant in this action. Thus it will be seen that the case turns on the ownership of the grain in controversy. It is conceded that, if plaintiff's husband was the owner, then the taking by the defendants was lawful, and plaintiff cannot recover; and, on the other hand, if plaintiff was the owner, such taking was unlawful, and plaintiff is entitled to recover. The case was tried to a jury, and a verdict was returned in favor of plaintiff. The defendants moved for a new trial, and this was granted. Plaintiff appeals from the order granting a new trial, and assigns the same as error. The motion was based entirely upon errors of law occurring at the trial. Accordingly, the order sustaining the motion must stand or fall upon the result of our review of the alleged errors. There is nothing in the record to indicate what particular grounds the court relied upon in granting the motion. We will, however, consider all that appear of substantial merit.

Counsel for respondents in his brief submits five propositions in support of the order granting a new trial. They are as follows: 1. Error in the admission of certain testimony; 2. Error in the failure to charge, amounting to a misdirection; 3. Refusing to charge as requested; 4. Error in the charge; 5.

Refusal to direct a verdict. A brief statement of facts is necessary to a consideration of these alleged errors. The grain in controversy was grown in 1896 upon a quarter section of land, which was then, and for five years prior thereto had been, occupied by the plaintiff and her husband as their homestead. The title to the land was in the plaintiff at all times since it was purchased. It was purchased with money derived from the sale of their former homestead. The title to this former homestead was in plaintiff when sold, and for four years prior thereto. Originally the title to it was in her husband. It appears that he transferred the title to her about the time a certain judgment was rendered against him, in favor of the Sandwich Manufacturing Company, in the district court of Grand Forks county. On June 23, 1896, the defendant Jones secured the issuance of an execution on said judgment, and in company with a deputy sheriff visited plaintiff's residence and took steps toward making a levy. No levy was made, however. Instead, the defendant Jones and the deputy sheriff induced plaintiff's husband to accompany them to Grand Forks, and there, at the solicitation of defendant Jones, Olson executed the note and chattel mortgage in favor of Jones, which have been referred to, as the basis of the claim and delivery proceedings, covering the crop then growing upon his wife's land. The plaintiff was not present when the mortgage was executed. Neither did she authorize or ratify its execution. Olson testifies that he protested against giving the mortgage on the ground that the property was his wife's, and this is corroborated by the ⁵⁰⁷ scrivener who drew the chattel mortgage. Jones himself says that he had difficulty in getting him to sign a mortgage for so large an amount, and that Olson stated that the real estate was not his, but belonged to his wife, but did not say the chattel property was his wife's, and did say that the crop was his. This latter statement is opposed to the testimony of both Olson and the scrivener. The fact is not disputed that the plaintiff had the apparent legal title to the land upon which the grain in question was grown. It is also one of the undisputed facts in the case that the plaintiff and her husband, with their children, resided on this farm at all times here in question, and that the grain involved in this action was grown upon this land. As to the ownership of the grain, plaintiff testified that she owned the land, and that the grain was raised under her direction and control; that the actual labor was done by her husband, their son, and hired men; that most

of it was done by her husband, who generally marketed the grain and brought her the money; that he usually made the purchases for the farm; that all disbursements were made by her, directly or through her husband, acting for her and at her request; that this was also the general method upon which she had conducted her farming operations for the nine years that she had title to the lands upon which they lived. Olson's testimony is to the same effect.

With these preliminary statements, we turn to the consideration of the errors upon which respondents rely to support the order granting a new trial. The first relates to rulings admitting answers to the following questions propounded to plaintiff in redirect examination: "1. Q. For whom did Albert Olson work in 1896? 2. Then you are controlling and running the farm? 3. Q. Whose grain was it, raised there in 1896?" And this question asked of Albert G. Olson in his direct examination: "4. Q. You may state who was the owner of the crop?" The objection to each question was that it was incompetent and called for the conclusion of the witness, and counsel contends that the overruling of such objections was error. The first two of the above questions so clearly call for statements of facts, and not conclusions, that they do not require extended notice. Plaintiff's answer that her husband worked for her, and that she ran the farm, was a statement of fact purely, and in no particular rested upon her opinion or inference. The other two questions call for a direct statement as to the ownership of the grain in controversy. Counsel's contention is that the answers to these questions were merely expressions of the opinions and conclusions of the witnesses, and were therefore objectionable, and he urges the governing rule that "when ownership is a material and ultimate fact to be determined in an action, and is controverted upon the trial, the witnesses should testify to the principal facts within their knowledge which bear upon such question, and not give their mere opinions and conclusions thereon." The rule as thus stated by the court of appeals of Kansas in *Brown v. Cloud County Bank*, 2 Kan. App. 352, 42 Pac. 593, is in harmony with the current of authority: *Farmer v. Brokaw*, 508 102 Iowa, 246, 71 N. W. 246; *Simpson v. Smith*, 27 Kan. 565; *Hite v. Stimmel*, 45 Kan. 469, 25 Pac. 852; *Montgomery v. Martin*, 104 Mich. 390, 62 N. W. 578; *Bahe v. Baker*, 44 Ill. App. 578; *Nicolay v. Unger*, 80 N. Y. 54. Undoubtedly, the foregoing authorities correctly state the

rule where the answer of a witness as to ownership involves his construction of facts or his conclusion as to what they establish. In such cases it is erroneous to permit witnesses to testify to the ultimate fact of ownership, and by so doing compel the jury to return a verdict upon the opinions and conclusions of the witnesses, instead of the primary facts upon which ownership is based. But it is also the unanimous voice of these authorities that where the answer as to ownership is direct, but is subsequently qualified by a statement of the facts relative to it, or tending to show such ownership, and discloses the facts upon which the answer is based, the error is cured, and is not ground for reversal. The reason for this, as stated in *Nicolay v. Unger*, 80 N. Y. 54, is that "defendants would receive all the advantage which would flow from the evidence given in regard to what transpired between the parties, and it would not add to its weight or increase its effect by proof of the conclusion of the witness": *Steele v. Benham*, 84 N. Y. 639; *Miller v. Long Island R. R. Co.*, 71 N. Y. 380. So if it was conceded that the questions objected to in the case at bar did in fact call for the conclusions of the witnesses, and not statements of fact purely, we nevertheless would be compelled to hold that the error was not material, and furnished no ground for granting the motion; for it appears in the record that counsel for defendants, by a prolonged and searching cross-examination, developed every fact which could in any way bear upon the question of ownership, and plaintiff's claim thereto. But we are agreed that in this case, under the facts as they appear, these questions did not call for an opinion, but a statement of a fact simply, and therefore come under the rule that where the question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, such question is admissible: *De Wolfe v. Williams*, 69 N. Y. 621; *Knapp v. Smith*, 27 N. Y. 277; *Sweet v. Tuttle*, 14 N. Y. 465; *Davis v. Peck*, 54 Barb. 425. In *De Wolfe v. Williams*, 69 N. Y. 621, the question objected to was this: "Whose was the property in the house at 516 Pacific street?" This was objected to "as a question of law." The objection was overruled, and witness answered that it was hers. The court held "that the question and answer were proper; that the title to property was ordinarily a simple fact, to which a witness having the requisite knowledge could testify directly." In *Davis v. Peck*, 54 Barb. 425, the question involved was whether

the plaintiff made a certain loan as receiver or individually. It was held that it was not error to permit him to answer in which capacity he acted. The court said that the inquiry embodied a fact within the knowledge of the plaintiff, and did not require the expression of an opinion on the law of the case. He, above all others, was in a position to know what the fact was. In *Knapp v. Smith*, 509 27 N. Y. 277, which is in many respects similar to the case at bar, a wife, who was the plaintiff in the action, was asked this question: "For whom did your husband do what business he did after you took the deed?" This was objected to as calling for a legal conclusion. Her answer was: "I expected he was doing it for me." The court said: "Legal considerations may, no doubt, be involved in a question of agency. But prima facie the inquiry whether a person engaged in a particular employment was doing business on his own behalf, or as the agent of another, involves only the question of fact whether he had been employed by that other person, and it is therefore a competent question to put to such person." In the case now under consideration the question of ownership was not a mixed question of law and fact. It rested upon two precedent facts, namely, that plaintiff owned the land, and that she herself produced the grain in controversy on said land. These facts were peculiarly within the knowledge of both the plaintiff and her husband, and when they testified that the plaintiff was the owner of the grain they did not give a conclusion or an opinion, but stated a fact within their knowledge. If these precedent facts were true, it conclusively followed that she owned the grain, and her ownership was a fact, and it was competent for her to so testify, subject to cross-examination, of course, as to the existence of the precedent facts. This case is not to be confounded with those where the answer of a witness does in fact involve the expression of an opinion or his conclusion or legal inferences. In such cases the objection urged would be proper. But in this case both witnesses knew who owned the land and who raised the crop, and could state from their own knowledge therefrom who was the owner of it; and this not as the statement of an opinion, but of a fact. And the test always is whether the answer calls for an opinion or a fact. The peculiar facts of each case must determine the rule to be applied. The one most generally applicable in actions for conversion is that stated in *Abbott's Trial Evidence*, 623. It is this: "A witness may testify di-

rectly, in the first instance, who owned the property, if he can do so positively, and not as mere opinion." The court did not err in admitting the evidence complained of.

The specification of errors as to the instructions may be treated under two heads: The first, failure to charge as requested; the second, error in the instructions given. Counsel for defendants asked the court to instruct the jury that if they found that the transfer of the land by Albert G. Olson to his wife, the plaintiff herein, was made to defeat the claim of the defendant, and that plaintiff had knowledge of such intent, then such transfer was void and conveyed no rights to her, and the defendant would in that event stand in the same position toward the grain in controversy as though no transfer had been made. Other requests similar in nature were asked. All of them were refused. And we are entirely clear that the court properly refused them, for there are no facts in the case calling for such instructions. In the first place, there never was a transfer of the title of the land on which this crop was grown from ⁵¹⁰ Albert G. Olson to the plaintiff. Olson never had title to it. It belonged to her from the date it was purchased. The only transfer made was nine years before. But that was his homestead, and was exempt. It was property to which the lien of the judgment did not attach, and was beyond the reach of an execution issued thereon. It was not possible to defraud his creditors by transferring the title to his wife, for it was property to which they could not look for the collection of the claims. For these reasons, even in a proper case, the transfer was not subject to attack. Counsel does not contend to the contrary. In fact, it is conceded that, so far as the actual title to the land is concerned, it is not vulnerable to assault because made in fraud of creditors; but counsel contend that such transfer is void for the reason and to the extent that it affects the title to crops thereafter grown on such land, because to that extent, he says, it tends to hinder and delay creditors in the collection of their debts. Briefly, counsel's position is this: If Olson had not transferred the title to the land, he, and not plaintiff, would have been the owner of the grain subsequently grown thereon. As a statement of fact, this is true; but as a ground for claiming that the transfer of the land was in fraud of creditors, it is not sound. Its fallacy lies in falsely assuming that the transfer of the title then and there conveyed something of value other than the land itself, namely, the

crops subsequently grown. Of course, Olson transferred to plaintiff nothing more than he had then, and that was the land itself. At that time these subsequent crops had no existence of value. By transferring the land to his wife he did not transfer crops afterward grown. They were subsequent creations, which plaintiff claims she herself produced. Counsel's contention is equivalent to saying that under proper conditions property may be transferred by a debtor, and such transfer shall not be subject to attack as a fraud upon creditors, and in the same breath declaring that the person obtaining it must not use it or profit by it. This proposition has no support in any principle known to the courts. The instruction requested was properly refused.

The following instruction given by the court was excepted to by defendants, and specified as error in the motion for new trial: "If from all the evidence in the case you believe that the plaintiff and her husband conspired together to defeat the payment of this mortgage by claiming that said property belonged to the plaintiff, when in truth and in fact it belonged to her husband, and that he in fact cultivated said land and raised said crop for his own use and benefit, and that he worked said land and raised said crop in his wife's name in pursuance of such collusive arrangement, then in that event your verdict should be for the defendant." Respondents' counsel criticises this portion of the charge as unintelligible, and also claims that it is erroneous. We do not think it is open to either objection. It was applicable to the evidence before the jury for consideration, and states the law entirely favorable to the defendants. If open to criticism at all, it is that it is too favorable to ⁵¹¹ them. By this instruction the jury were required to find for the defendants if they should find that plaintiff's husband cultivated the land and raised the crop for his own use and benefit. To reach this conclusion, it was necessary for them to find that the claim of the plaintiff and her husband that the crop was hers was false and collusive, and the court correctly states that this was essential before a verdict could be found for defendants. Inasmuch as the plaintiff owned the land and was entitled to its use, the crops, presumptively, were hers. The right of her husband to crop the land, if it existed, must of necessity have been founded on a transfer of such right to him by the plaintiff in some form which the law would recognize as having that effect. The law applicable would have been more correctly stated if the court had instructed the jury that if they

found from the evidence that plaintiff's husband had obtained from plaintiff the right to use the land for the cropping season of 1896, and had produced the crop thereon for his own benefit and on his own account, then he, and not the plaintiff, was the owner thereof, and the verdict must be for the defendants. The failure of the court to require the jury to find that Olson had a right to the use of the land for cropping purposes rendered the charge extremely favorable to the defendants.

The remaining error relied upon is the refusal of the court to direct a verdict for defendants. The ground of the motion was that plaintiff had failed to show that she was the owner of the grain or that she was either in possession or entitled to possession. There are two particulars in which defendants claim that plaintiff failed. The first is that the evidence shows conclusively that she was not the owner of the land. This feature of the motion is based wholly upon the theory that the transfer of title by her husband was in fraud of creditors, and therefore void. This, as we have seen, is not tenable, and requires no further notice. The second ground is that the evidence shows conclusively that she did not cultivate the land and raise the crop. We do not so read the evidence. Both plaintiff and her husband testify that the crop was grown under her direction and control. It is true that plaintiff stated that her husband attended to practically all business details, and it appears also that he did most of the work on the farm, without compensation other than his living. But the mere fact that he devoted his labor and time to producing the crop, and did this gratuitously, has no legal efficacy to vest the title of such crop in him. The existence of the marriage relation did not remove the right to manage and control her own property which she had as a single woman. Section 2767 of the Revised Codes provides that "the wife after marriage has with respect to property, contracts, and torts the same capacity and rights and is subject to the same liabilities as before marriage." It is now so well settled that the gratuitous contribution of a husband's time and skill to the management of his wife's property creates no title to its profits or increase in him, that the question is no longer debatable: See *Heartz v. Klinkhammer*, 512 39 Minn. 488, 40 N. W. 826; *Duncan v. Kohler*, 37 Minn. 379, 34 N. W. 594; *Deere v. Bonne*, 108 Iowa, 281, 75 Am. St. Rep. 254, 79 N. W. 59, and numerous authorities cited. It is clear that the trial court properly refused to direct a verdict for the defendants, and to have done so would have constituted

reversible error. Our review of the record upon which the motion was based shows no error. It should have been denied. The district court is accordingly directed to enter an order vacating its order granting a new trial.

All concur.

A CONVEYANCE OF A HOMESTEAD BY A HUSBAND to his wife cannot be a fraud upon his creditors: Note to Kettleschlager v. Ferrick, 76 Am. St. Rep. 626. See, also, White Sewing Machine Co. v. Wooster, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000.

A HUSBAND HAS NO INTEREST IN CROPS which are grown on his wife's lands and which he has helped to cultivate, and his creditors, consequently, have no greater interest in them than he has: See the monographic note to Morris v. Fletcher, 77 Am. St. Rep. 98.

BIDGOOD v. MONARCH ELEVATOR COMPANY.

[9 N. Dak. 627, 84 N. W. 561.]

CHATTEL MORTGAGES—PROPERTY NOT IN EXISTENCE.—An agreement may be made to create a lien upon property not yet acquired, or not yet in existence, and the lien attaches from the time when the party agreeing to give it acquires an interest in the property to the extent of such interest.

CHATTEL MORTGAGES—CROP TO BE GROWN—INTEREST NEVER ATTACHING TO SPECIFIC GRAIN.—A chattel mortgage, executed by a tenant upon a portion of a crop which is to be raised by him under a contract, whereby the title and right of possession of the crop remained in the landlord until the crop was divided, never attaches to the tenant's interest in such crop, where the specific grain raised was never divided, but was delivered to the defendant for general storage, and subsequently the landlord and tenant agreed upon their respective shares, and general storage checks were issued to them for the number of bushels to which each was entitled, since the tenant acquired no interest in the specific grain raised to which the mortgage lien could attach.

W. E. Purcell, for the appellant.

Freerks & Freerks, for the respondent.

628 BARTHOLOMEW, C. J. This is a contest wherein the plaintiff, claiming as mortgagee, seeks to recover from the defendant damages for the conversion of certain wheat. A trial to a jury resulted in a directed verdict for plaintiff. A new trial was denied, and defendant appeals from the judgment.

Among the numerous errors assigned we shall notice but one, and that relates to the ruling of the court in directing a ver-

dict for plaintiff. This ruling must be reversed, because we are clear that under the evidence, as it now stands, it does not appear that plaintiff's mortgage ever attached. The mortgage was given to plaintiff by one A. C. Weldon to secure a promissory note, both note and ⁶²⁹ mortgage bearing date April 7, 1899. The mortgage purported to cover "one-half of crop sown and grown on the west one-half of northeast one-quarter of section 17, township 132, range 48, for the year 1899." The mortgagor, Weldon, was in possession of said land by virtue of a contract of lease theretofore entered into with the owner of said land. This contract was introduced into evidence. It is long, and specific in its provisions. Its substance is, in effect, that the tenant, the party of the second part, shall raise the crop entirely at his own expense, and shall perform certain covenants in the lease contained. In case of failure to perform, the first party may perform and retain sufficient of the crop to reimburse himself, but ultimately the first party (the landlord) is to deliver so much of the crop to second party as will, with amounts retained for expenses incurred, give the second party (the tenant) the benefit of two-thirds of the crop grown; and the lease declares that "until such delivery the absolute title of all the grain raised upon said premises shall be and remain in the party of the first part, and the said party of the second part acquires no right, title, or interest therein." The tenant raised a crop upon the land in the year 1899. This court has held that under such a contract the title and right of possession of the crop were in the landlord, and remained in him until divided as provided in the lease, and that, if the tenant took possession of the crop, or any part thereof, before such division, the landlord could maintain replevin therefor: *Angell v. Egger*, 6 N. Dak. 391, 71 N. W. 547; *Whithed v. St. Anthony etc. Elev. Co.*, 9 N. Dak. 224, ante, page 562, 83 N. W. 238. When the crop in question in this case was threshed, it was hauled, without division, to the elevator of the defendant, and placed in general storage. At that time the landlord had full title to and control of the entire crop. He was present when it was so delivered, and the tenant was also present, and the mortgagee, who was in the employ of the tenant, was also present, and hauled and delivered a portion of the crop; and all these parties knew the grain was being delivered for general storage. After the wheat was all so delivered, the landlord and tenant agreed upon their respective shares thereof, and the agent in charge of the elevator was requested to issue a storage

check to each party for the number of bushels to which he was entitled. This was done. These tickets were general storage tickets. They did not entitle the holder to a return of the identical wheat delivered, but only to an equal number of bushels of the same quality and grade of wheat. The wheat represented by the ticket delivered to the tenant was subsequently sold, and the mortgagee received no part of the proceeds. He now seeks to recover from the elevator company as for conversion of the wheat upon which the mortgage was given. He claims that the defendant had constructive notice of his mortgage by reason of the fact that it was on record in the proper office, and also that he gave the elevator agent actual notice thereof before the first load of said wheat was delivered. The sufficiency of these notices is questioned, but, in our view, the question is entirely ³³⁰ immaterial. If plaintiff in fact had no mortgage, or, rather, if the lien of his paper mortgage had not attached when the grain was delivered, then defendant might receive it regardless of any claim of mortgage lien made by plaintiff. Section 4680 of the Revised Codes reads as follows: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." By the express terms of the lease under which this crop was raised the tenant (the mortgagor) could "acquire no right, title, or interest therein" until a division was made. Hence plaintiff had no lien when the grain was delivered to the defendant. If any lien under the mortgage ever attached, it could attach only to the one-half of the specific wheat grown upon the land described in the mortgage. It could not attach to other wheat which the mortgagor might be entitled to demand of the defendant upon his storage ticket. The lien of a mortgage cannot thus shift from one piece of property to another: See *Best v. Muir*, 8 N. Dak. 44-48, 73 Am. St. Rep. 742, 77 N. W. 95. So far as plaintiff is concerned, his rights are not different from what they would be had the mortgage upon the one-half of the crop grown upon the land specified been executed and delivered to him after the grain had been delivered to the defendant, and indistinguishably mixed with other wheat, and storage tickets issued therefor to the mortgagor. In that case the mortgage lien could not attach to the specific wheat for two reasons: 1. It could not be identified or separated; and 2.

The mortgagor at that time had no interest in that specific grain. He had only the right to demand of defendant a certain number of bushels of wheat of a certain kind and grade. The mortgage could not attach to that right. We are clear that on the evidence as it now stands it is not shown that the mortgage ever attached.

The judgment of the district court is reversed and a new trial ordered.

All concur.

A CHATTEL MORTGAGE ON AN UNPLANTED CROP may be created: *Hall v. Glass*, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 336. The mortgage lien will attach to the crop as soon as it comes into existence through the agency of the mortgagor: *Donovan v. St. Anthony etc. Elevator Co.*, 7 N. Dak. 513, 68 Am. St. Rep. 674, 75 N. W. 809. See, further, as to the nature of such a mortgage, *Paptasco Guano Co. v. Ballard*, 107 Ala. 710, 54 Am. St. Rep. 131, 19 South. 777, and note. As bearing on this question, consult, also, the recent cases of *McNeal v. Rider*, 79 Minn. 153, 79 Am. St. Rep. 437, 81 N. W. 830; *Best v. Muir*, 8 N. Dak. 44, 73 Am. St. Rep. 742, 77 N. W. 95; *Whithed v. St. Anthony etc. Elevator Co.*, 9 N. Dak. 224, ante, p. 502, 88 N. W. 238.

CASES
IN THE
SUPREME COURT
OF
OHIO.

**PENNSYLVANIA FIRE INSURANCE COMPANY v.
DRACKETT.**

[63 Ohio St. 41, 57 N. E. 962.]

INSURANCE—ARBITRATION AS BAR TO CLAIM FOR TOTAL LOSS.—If the insured insists that the loss is total, an agreement to arbitrate or an arbitration had fixing the amount does not preclude him from bringing suit as for a total loss and recovering therefor, if the evidence establishes his claim.

INSURANCE—TOTAL LOSS—WHAT IS.—If a loss by fire is such that the identity and specific character of the building insured are destroyed, and it can no longer be called a building, and the portions that remain cannot be utilized to advantage in rebuilding, the loss is total. In such case all of the material composing the building need not be destroyed, in order to constitute a total loss.

C. W. Fuller, for the plaintiff in error.

J. W. Taylor and T. J. Moffett, for the defendants in error.

⁵³ **MINSHALL, J.** The case presents two questions we shall notice: 1. In view of section 3643 of the Revised Statutes, was the plaintiff bound by the amount fixed by the arbitrators, whether there was a total loss or not? 2. What ⁵⁴ constitutes a total loss within the meaning of that section, and did the court err in instructing the jury in this particular?

1. We have no difficulty in answering the first question in the negative. The section referred to requires a company insuring any building or structure against fire to cause such building or structure to be examined by an agent, who is required

to make a full description of the building or structure and fix its insurable value; and then provides that, in the absence of any change increasing the risk without its consent or any intentional fraud on the part of the insured, in case of a total loss, the whole amount stated in the policy on which it receives premiums shall be paid by the company; and in case of a partial loss the full amount of such loss shall be paid. Statutes similar in their provisions are common to many of the states of the Union; and it is generally agreed that they rest on grounds of public policy—the prevention of the mischief incident to overinsurance—and that the insured cannot be held to a waiver of them: *Insurance Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, 41 N. W. 443; *St. Clara Academy v. Northwestern etc. Ins. Co.*, 98 Wis. 257, 67 Am. St. Rep. 805, 73 N. W. 767; *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570, 27 S. W. 718; *White v. Connecticut etc. Ins. Co.*, 4 Dill. 177, Fed. Cas. No. 17,545; *German Ins. Co. v. Eddy*, 36 Neb. 461, 54 N. W. 856; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552, 13 Am. & Eng. Ency. of Law, 2d ed., 361. It does not necessarily follow from this that where there is a partial loss, it may not be ascertained by arbitrators; and where there is a clause in the policy requiring arbitration, the parties may be required to conform to it. But where the insured insists that the loss is total, the agreement to arbitrate, or an arbitration had fixing the amount, will not preclude him from bringing a suit as for a total loss.⁵⁵ And in such case, if he establishes that there was a total one, he is entitled to recover the full amount of the policy, notwithstanding the award of the arbitrators was to the contrary, and fixed a less amount as the measure of the loss. But, on the other hand, should he fail in establishing a total loss, the amount of his recovery will be limited to the amount of the award, where there was no fraud in obtaining it. The jury was so instructed in this case, and, consequently, there is no error in the charge in this regard.

2. This is the first case in this court presenting the question as to what is a total loss within the meaning of the section above referred to. For while the subject of a total loss is discussed in *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, it was a case of marine insurance complicated with the question of a constructive loss, known to that kind of insurance. It has, however, received the consideration of the courts of other

states, having statutes similar to our own, and whilst there is some difference in modes of expression, there seems to be no substantial difference of opinion. It seems to be agreed that it is not necessary, to constitute a total loss, that all the material composing the building should be destroyed; it is sufficient, though some parts of it remain standing, that the building has lost its identity and specific character as a building, the insurance not being upon the material composing the building, but upon the building as such. When the loss by fire is such that its character as a building is destroyed, and it remains simply as a mass of ruins, parts of which may remain standing, but of no value in repairing or rebuilding the structure, though something might be realized for the material by removing it, the loss is regarded as total. Thus, in *Joyce on Insurance*, section 3025, it ⁵⁶ is said: "In case of an insurance upon a building under a fire risk, the first principle is, that it is the building, and not the materials of which it is composed, that is covered, and therefore total loss does not mean necessarily an absolute extinction of every part and parcel of the property. In such risk there is a total destruction and loss when, by the peril of fire, the building becomes a mass of ruins and rubbish, and loses its specific character, and ceases to be a building, becomes unfit for use as such, without regard to the fact that even some parts may be left entire, or that a large portion of the building be left standing and not actually destroyed": See, also, *Wood on Insurance*, sec. 107; *May on Insurance*, sec. 421a; *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77; *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, 41 N. W. 443; *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570, 27 S. W. 718.

The general charge was quite liberal to the defendant, more so probably than it should have been. The court said to the jury: "There can be no total loss so long as a remnant of the structure standing, the stone foundation being disregarded, is reasonably adapted for use as a basis upon which to restore the building to substantially the condition in which it was before the injury by fire. And whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question before the injury, would in proceeding to restore the building to substantially its original condition, utilize such remnant as a basis for such reconstruction."

But it is said this is not consistent with instructions 4 and 7 given at the request of the plaintiff. This may be and, as to the seventh, is probably so, but we regard these instructions as having been properly given. They are as follows:

57 "4. A policy of insurance is upon the building as such, and not upon the materials of which it is composed. If you find that the identity and specific character of the insured building was entirely destroyed by fire, then you must find for the plaintiff."

"7. Although you may find that after the fire a large portion of the four walls were left standing, and that certain parts of the building were left untouched by the fire, still if you find that the building has lost its identity and specific character, you may find that the building was totally destroyed."

These charges state in a general form what seems to be the received law applicable to the case. The criticism is that the court should have defined what is meant by "identity" and "specific character." But taken in connection with the general charge, there could have been no misapprehension as to the meaning. The terms are not obscure and convey as well as words can the idea to be expressed by them. A building loses its identity and specific character when it has been so far destroyed by fire that it can no longer be called a building, and the portions that remain cannot be utilized to advantage in rebuilding it. That something might be realized out of portions that remain, for other purposes, is not material.

As to what will constitute a total loss in a given case must, within the meaning of the statute, necessarily be, to a great extent, a question of fact for the jury to determine under proper instructions from the court. What remaining parts could be made available in rebuilding can only be determined by exercising a sound discretion in the light of the evidence. Two courts with power to weigh the evidence have done so, and sustained the verdict; and it can hardly be expected that this court, not required to weigh the 58 evidence, will disturb the verdict, where the jury was properly instructed. Much of the evidence tends to show that the building was reduced to a mere wreck, and that nothing remained that could be utilized in rebuilding it.

We see no error in the admission of evidence. The mortgagees, being directly interested and parties to the suit, had a right to show what the loss was. And as to the letters of Taylor, they simply tended to show that he had not consented to

any waiver by submission to arbitration; and whether he had or not was immaterial.

Judgment affirmed.

INSURANCE.—WHILE A PROVISION FOR ARBITRATION in an insurance policy is binding, it is collateral to the contract of insurance, and if it fails of accomplishment without fault of the parties, they are relegated to their legal rights independent thereof: *Western Assur. Co. v. Hall*, 120 Ala. 547, 74 Am. St. Rep. 48, 24 South. 936.

INSURANCE.—TOTAL LOSS does not mean the absolute extinction of a building. The test is, whether the building has lost its identity and specific character so that it can no longer be called a building. If, though some part of it remains standing after a fire, that part is not sufficient to constitute in any sense a building, then, in contemplation of law, there has been a total loss: *Santa Clara etc. Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 67 Am. St. Rep. 805, 73 N. W. 767; note to *Royal Ins. Co. v. McIntyre*, 59 Am. St. Rep. 810, 811.

OVERHISER v. OVERHISER.

[63 Ohio St. 77, 57 N. E. 965.]

INSURANCE—LIFE—RIGHT OF DIVORCED WIFE TO.— If a married woman is named as beneficiary in an insurance policy on the life of her husband, she is entitled to the proceeds of the policy, although their marital relations are terminated by divorce or otherwise prior to his death.

Suit on a policy of life insurance. At the time of the execution of the policy in suit on the life of G. P. Overhiser he was married, and the policy was made payable to his then wife, Lena. Prior to his death she obtained a decree of divorce from him. Judgment for the defendants and plaintiff appealed.

J. C. Robinson, Jr., for the plaintiff in error.

Johnson & Levy, for the defendants in error.

THE COURT. Lena Overhiser was named in the policy as the beneficiary, and the words "wife of George P. Overhiser" were descriptive only. The policy defines in express terms the only condition upon which it should be payable to the administrator of George P. Overhiser, viz., that Lena should not be living at the time of his death. It contains no terms indicating that her right to the fruits of the policy is conditioned upon her remaining his wife.

The policy was executed to him, and the presumption is that it was upon his application. But if the insurance was effected by her, she had at the time an insurable interest in his life, and the contract would not become void by the termination of the marital relation before his death. The conclusion of the courts below is in accordance with settled principles: Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457; Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. Rep. 41.

Judgment affirmed.

BENEFIT INSURANCE.—A DIVORCED WIFE is not entitled to a benefit designated for her before divorce in a certificate of mutual benefit insurance, unless equities have arisen in her favor: See the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 571.

LIFE INSURANCE.—THE BENEFICIARY under a policy of life insurance has a vested interest therein: Jackson Bank v. Williams, 77 Miss. 398, 78 Am. St. Rep. 530, 26 South. 965. Compare Independent Foresters v. Kellher, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563.

MYERS v. JENKINS.

[63 Ohio St. 101, 57 N. E. 1089.]

APPELLATE PRACTICE—FILING OF DEMURRER.—If the court journal shows that a demurrer was argued, submitted to, and decided by the trial court, and bears the file marks of the clerk, it must be held on appeal to have been filed, although the clerk has failed to enter such filing on the printed record.

BENEFICIAL ASSOCIATIONS—SICK BENEFITS—FROM WHOM DUE.—The members of a beneficial order are not individually liable to another member for sick benefits unless by some express law of such order. The obligation to pay sick benefits rests upon the lodge of the order alone.

BENEFICIAL ASSOCIATIONS—METHOD OF RECOVERING BENEFITS.—A member of a beneficial order claiming to be entitled to sick benefits must first seek his remedy in the tribunals of the order, and the determination therein in substantial compliance with its laws is final and conclusive of the right to such benefits; but if the order refuses or neglects, upon proper demand, to thus determine the right to benefits, or refuses to pay them after they have been awarded to the member, he is then entitled to sue in the civil courts for their recovery.

BENEFICIAL ASSOCIATIONS—CONTRACTS OUSTING COURTS OF JURISDICTION.—A member of a beneficial association cannot bind himself by contract, in advance, to abide by the decisions of the tribunals of the organization and renounce his right

to appeal to the civil courts for the redress of wrongs committed by such tribunals. Such contract is void.

BENEFICIAL ASSOCIATIONS—LOSS OF RIGHT TO SUE FOR BENEFITS.—If it is determined by a tribunal of a beneficial order, in substantial compliance with its laws, that a member is not entitled to sick benefits, and he appeals to a higher tribunal of the order and is furnished with a proper transcript of the proceedings, but thereafter fails to secure a hearing of his appeal by reason of his own negligence, his failure to secure such hearing does not entitle him to sue for benefits in the civil courts.

S. L. James and S. M. Hunter, for the plaintiffs in error.

Kibler & Kibler and B. G. Smythe, for the defendant in error.

¹¹⁴ **BURKET, J.** It is urged by counsel for defendant in error that the record does not show that the bill of exceptions was filed in the circuit court. The record ¹¹⁵ shows that eight original papers were filed in the circuit court, and the bill of exceptions being an original paper under section 6716 of the Revised Statutes, it sufficiently appears by the record that it was filed in that court. It is further urged that the record does not show that the demurrer to the amended petition was filed in the court of common pleas. The journal of January 30, 1896, recites as follows: "This day came the parties and this cause came on for hearing upon the separate demurrers filed by the several defendants to the amended petition of plaintiff and was argued by counsel." It cannot be presumed that a court and counsel on both sides would hear, argue, and pass upon a demurrer which had never been filed. And as this demurrer has been argued by counsel and decided by the court, and bears the file mark of the clerk, we are satisfied it was filed, and that the omission of its filing from the printed record is the result of some oversight or mistake.

There is no promise or obligation on part of the members of the lodge to pay sick benefits to members set out in the petition. The averment is that a disabled member is entitled, under the laws of the order, to receive sick benefits, but there is no averment that he is to receive sick benefits from his fellow members, and the irresistible inference is that he is to receive his benefits from the lodge, and not from the members individually. True, he says that there is due to him from the members of the lodge by reason of the premises the sick benefits claimed; but he has set out the premises in the fore part of his petition and those premises show that the benefits are not due from the members but from the lodge; and there is no averment in the

petition that the officers are liable to pay sick benefits. The ¹¹⁶ laws of the order as pleaded and introduced in evidence show no obligation upon the members to pay sick benefits, either individually or as officers of the lodge. The demurrer to the amended petition should therefore have been sustained as to the officers and members of the lodge, and upon the conceded facts in the case there is no cause of action against them.

The petition seems to state a good cause of action against the lodge. It is silent as to whether there is a tribunal within the lodge to pass upon the question of sick benefits when claimed by a member, and it may well be doubted whether a court can take judicial notice of the existence of such tribunal. The better practice is to plead the existence of such tribunal, if there is one, in the petition, and aver that the plaintiff has exhausted his remedies in the lodge, and has a cause of action against the lodge in the civil courts, setting out the facts which give him such cause of action. In this case the existence of a tribunal in the order for the settlement of all disputes, as to claims for sick benefits, is shown in the answer, and also by the printed laws of the order attached thereto and introduced in evidence. We cannot hold, therefore, that there was prejudicial error in overruling the demurrer of the lodge to the amended petition of the plaintiff.

There was no error in overruling the demurrer of the lodge to the reply, for the reason that if the lodge arbitrarily refused to pay his sick benefits and refused to investigate the plaintiff's right to receive the same, and refused to permit the committeeman selected by him to serve or act in his behalf, he had a right to bring his action in the civil courts to recover such benefits. But if objection was made by anyone or for any cause to the committeeman selected ¹¹⁷ by him, and he thereupon selected another who accepted and served on the committee, he thereby waived the first selection, and the committee as constituted became a lawful committee under the laws of the order.

There was error in the admission in evidence of the letter from J. E. Dow. The only purpose of the admission of that letter was to prove that the plaintiff below had filed a transcript with Mr. Dow as District Deputy Grand Master. The controversy was between the plaintiff and the lodge, and what a third party said about the matter could not bind the lodge. Mr. Dow was not acting as the agent of the lodge, and if he had been what he said as to a past transaction would not

bind his principal. He was acting while in office officially as the deputy of the Grand Master, to supervise all the lodges within his district. What he did or said while in office was for and in behalf of his superior, the Grand Master, and not for or in behalf of the lodge to which he belonged. It is not clear whether or not he was still in office when he wrote this letter, but in either event it was not competent and could not bind the lodge. For aught that appears, his testimony could have been obtained by deposition or otherwise, and this should have been done.

It was also error to permit the plaintiff below to testify as to the contents of the letter to him from the Grand Master at Toledo. The lodge was not bound by what was said in the correspondence between the plaintiff and the Grand Master. If the contents of the letter were competent, the letter-press copy thereof kept by the Grand Master was better evidence than the recollection of the plaintiff. Such officers usually keep letter-press copies of all official letters written by them, and an effort ¹¹⁸ should first be made to obtain such copy before resorting to less satisfactory testimony.

The most difficult question in the case arises upon the charge of the court, and the refusal of the court to charge as requested.

The laws of the order as shown in the evidence provide that when a dispute arises as to the payment of sick benefits, the Noble Grand shall appoint one member and the claimant of benefits one member, and these two shall choose a third, and the three members thus chosen shall constitute a committee to hear the evidence and report to the lodge; and the claimant being notified, the lodge shall proceed to consider the report, and determine whether the claimant is entitled to benefits. From the action of the lodge the claimant may appeal or prosecute error to what is known as the Grand Committee, which consists of all the members in the district who have at any time held the office of Noble Grand in any lodge, and are in good standing. Such members are known as Past Grands. The Past Grands of the lodge to which the claimant belongs are by the laws of the order excluded from participating in the proceedings of the Grand Committee upon such appeal or proceedings in error, so that the Grand Committee for the trial of such appeal or proceedings in error consists of the Past Grands of the district, other than the Past Grands of the lodge to which the claimant belongs. The Grand Committee may hold regular meetings, and the District Deputy Grand

Master shall call a special meeting on the request of five Past Grands in good standing, or he may, if deemed necessary, order a special meeting without request. From the action of the Grand Committee an appeal may be taken to the Grand Lodge, or error may be ¹¹⁹ prosecuted thereto. If the District Deputy Grand Master fails to perform his duties, the attention of the Grand Master may be called to such failure, or a complaint in the nature of a grievance may be filed against him in the Grand Lodge, and he may be compelled to perform his duty. From the action of the Grand Lodge an appeal may be taken to the Sovereign Grand Lodge, if the Grand Lodge votes to permit such appeal.

The claim of the lodge was, and it requested the court to so charge, that the claimant of benefits must seek his remedy in said tribunals of the order, and that their determination was final, and that the civil courts had no jurisdiction of the matter. The court charged the jury that the claimant must in the first instance seek his remedy in the tribunals of the order, and wound up by the following: "If that tribunal has been created, and has finally heard and determined this matter, that determination is conclusive upon the parties; but if, for any reason they have refused to hear and determine this matter in any of the various stages provided for its determination by the rules of the order, then he may come into court and sue and ask the court to determine his right to recover; and if he has a right to recover, he may recover it in the court."

The request to charge was too broad in this respect, that it robs the civil courts of their jurisdiction in a matter for the recovery of money, by an agreement made in advance of the accruing of any claim or demand. The case of *Baltimore etc. R. R. Co. v. Stankard*, 56 Ohio St. 224, 60 Am. St. Rep. 745, 46 N. E. 577, is to some extent in point, and shows that after the settlement of preliminary matters and the fixing of the amount due, the courts cannot be robbed of their jurisdiction to compel payment. The ¹²⁰ right to appeal to the courts for the redress of wrongs is there held to be inalienable, but is by mistake printed "alienable." The same mistake was made in *Palmer v. Tingle*, 55 Ohio St., in fourth line from the top of page 443, 45 N. E. 315, where the word "inalienable" is printed "alienable."

It is urged that the right to resort to the civil courts for redress may be waived, and cases are cited, among others, *Butt v. Green*, 29 Ohio St. 667, 671, wherein it is held that a party

may waive constitutional and statutory provisions intended for his benefit and protection. No fault is found with that case, but it is not applicable to the question here under consideration. The distinction is this: After a right has accrued or an obligation has been incurred, a party may waive his rights or refuse and neglect to enforce them, or he may by contract bind himself to submit the matter to arbitration or other special remedy. But a party cannot bind himself by contract in advance to renounce his right to appeal to the courts for the redress of wrongs. If this could be done an association might be formed in the state which would renounce our constitution and laws, and set up a different system of government for themselves, and in case of wrongs and oppression they would be debarred from resorting to our courts, and would be compelled to submit to the decisions of their own tribunals, and would most likely become dissatisfied and disorderly, resulting in riot and bloodshed. The whole state has an interest in all its inhabitants, and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can, by contract in advance, deprive himself ¹²¹ of the right to appeal to them. As pointed out in the case of *Baltimore etc. R. R. Co. v. Stankard*, 56 Ohio St. 224, 60 Am. St. Rep. 745, 46 N. E. 577, contracts may provide for ascertaining and fixing certain matters in a particular manner, but the ultimate adjudication of the questions of law must remain in the courts, unless waived after the rights have accrued, or the obligations have been incurred. Jurisdiction cannot be conferred upon courts by contract, and it cannot be taken away by contract; but in certain cases a party may be estopped by his contract from invoking the jurisdiction and aid of a court in his behalf.

The *Stankard* case is different from the case at bar in this: In that case the construction of language, the meaning of the regulations, or of any writing, decision, instruction or acts was to be conclusively determined by the superintendent, or by the committee on appeal, and it was held that the court could not be robbed of its jurisdiction to put its own construction upon such matters. In the case at bar it is claimed by the lodge that the tribunals of the order have sole jurisdiction of the subject matter, and that the courts cannot take jurisdiction in any event to compel payment of sick benefits. The claim is too broad. If the lodge refused to proceed substantially as re-

quired by its laws to settle the dispute as to sick benefits, or if the right to such benefits should be determined in favor of the claimant and the lodge should fail to pay the same, an action might be maintained for the recovery thereof, but mere irregularities in the proceeding could not be regarded as a refusal to act. To authorize an action in court there should be no pretense of a proceeding in the lodge under the laws of the order upon proper request by the claimant for the settlement of the right to sick benefits, or else the proceedings ¹²³ should be so defective in substance as to render a judgment in a court of justice under the same circumstances null and void. There was, therefore, no error in refusing the charge as requested.

The next question is as to the charge as given, to which there was an exception. The lodge referred the dispute as to sick benefits to a committee of three as provided by the laws of the order, and that committee reported adversely to the claimant, and when he was present in the lodge and no further notice to him required, the lodge acted upon the report and unanimously adopted it, and thereby determined that he was not entitled to sick benefits. This was conclusive against him unless he should succeed in changing the result by a proceeding in one of the higher tribunals of the order. He gave notice of appeal—this seems to be conceded by all. He says that he obtained a transcript from the secretary, while the secretary says he does not recollect of giving him a transcript and does not remember that he asked for or demanded one. There is no claim or pretense that the lodge or the secretary refused to give him a transcript. The lodge, therefore, did all that the laws of the order required to enable the plaintiff to perfect his appeal and establish his right to sick benefits before the Grand Committee. The lodge had a determination in its-favor, and by giving him a transcript did all in its power, and all the laws of the order required of it, to enable him to perfect his appeal; and if he thereafter failed in his appeal, it was his misfortune and not the fault of the lodge; and the lodge could not be held in an action at law because he failed to secure a hearing before the Grand Committee on his appeal. The members of the lodge formed no part of the Grand Committee in the hearing of his appeal. By obtaining the request ¹²³ of five Past Grands in his district he could have compelled the District Deputy Grand Master to convene the committee and hear his appeal. It was his duty and not the duty of the lodge to see to the convening of the Grand Committee, and his failure to induce the Dis-

strict Deputy Grand Master to convene the Grand Committee could not be charged against the lodge, and could not give him a right to sue the lodge for sick benefits which it had been determined by the laws of the lodge that it did not owe to him. As well might a party who has been defeated in a court of justice and appealed to a higher court, and failed for any cause to perfect his appeal, claim that by reason of such failure he has the right to begin a new action to recover his demand.

The court charged that "if for any reason they have refused to hear and determine this matter in any of the various stages provided for its determination by the rules of the order then he may come into court, etc." This is too broad. The lodge was not responsible for what occurred in the various stages in the higher tribunals after it got beyond the lodge. The determination was against him in the lodge, and after the transcript was furnished to him by the lodge, the burden was thereafter on him to get rid of that determination, and if he failed in his appeal by reason of his own negligence or the negligence of others than the lodge, he cannot hold the lodge responsible for such negligence, and cannot make the same a basis of an action against the lodge. There was, therefore, error in the charge as given.

One ground of error in the action for a new trial and also in the petitions in error, is that the amount of the verdict is excessive. The special verdict shows that the time was calculated to September 21, 1896, ¹²⁴ while the petition was filed December 30, 1892, and it is averred that he was expelled from the order August 4, 1891. It seems clear that he could not recover for sick benefits which had not accrued when he filed his petition, and that no sick benefits could accrue after his expulsion. The verdict was therefore excessive.

For the errors above pointed out the judgments below will be reversed and a new trial granted as to the claim against the lodge, and as to the other defendants below, final judgment will be entered in their favor.

Judgment accordingly.

ASSOCIATION—SICK BENEFIT—RESORT TO COURTS.—If, by the constitution and by-laws of an association, a member is entitled to sick benefits, but is required to submit his claim therefor to the association, and, if aggrieved by its action, to appeal to its grand lodge, whose decision is declared to be final, any member claiming the right to such benefits must pursue his claim therefor

in the lodge or grand lodge, and, failing to do so, cannot resort to the courts with success: *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170. See, further, on the necessity of a member pursuing his remedies within the association and the conclusiveness of the decisions of its tribunals, the monographic note to *Robinson v. Templar*, 59 Am. St. Rep. 203-209.

WARD v. WARD.

[63 Ohio St. 125, 57 N. E. 1095.]

HUSBAND AND WIFE—DOWER—CONVEYANCE IN CONTEMPLATION OF MARRIAGE.—If a man who has entered into a contract of marriage, subsequently to such contract and before his marriage, voluntarily conveys a portion of his land to his sons without consideration, and without the consent or knowledge of his intended wife, the conveyance is in fraud of her marital rights, and upon his death she is entitled to dower in the land thus conveyed.

Bell & Brinkerhoff, for the plaintiffs in error.

Laser & Huston, for the defendant in error.

¹²⁵ MINSHALL, J. The plaintiff below, as appears from her amended petition, being the widow of John Ward, deceased, brought suit to set aside certain antenuptial deeds that had been made by her husband to his children by a former wife, and to be endowed in the lands, on the ground that the conveyances were voluntary and in fraud of her rights as a wife, she being without knowledge of the facts at the time of the marriage. The case was appealed to the circuit court and there decided in favor of the plaintiff. There is no finding of facts, the finding being simply in favor of the plaintiff and that she is entitled to dower in the land. But a bill of exceptions was taken containing all the evidence and made part of the record. The material facts are, however, not in dispute. Prior to November 18, 1892, John Ward, a widower, living in Richland ¹²⁶ county, Ohio, was the owner of one hundred and six acres of land, which he had acquired during the life of his first wife. He had five children all grown and married—three sons and two daughters. His eldest son, C. C. Ward, lived on the premises and occupied a house on seven and a fraction acres which he had purchased from his father for three hundred dollars, but for which he had no deed. As to this tract, however, there is no controversy. On November 18, 1892, in contemplation

of marriage, he executed and delivered to C. C. Ward a deed for twenty-five acres, including the seven acres and a fraction. On the next day he executed a deed to H. N. Ward for about thirteen acres; and on November 23, 1892, he executed a deed to his other son for eighteen acres; and in the evening of the same day he married Catherine Stough, who is now his widow and plaintiff below. There is some controversy as to when these deeds were delivered; but we will assume that they were delivered, as claimed, before the marriage. She, however, had no knowledge of their existence at the time of the marriage, nor until after the death of her husband, when they were placed on record. They were in each case voluntary deeds supported by no other consideration than the love and affection of a father for a son, except as to the seven acre tract contained in the deed to the eldest son, and which, as we have stated, is not in question.

The question then arises upon this state of facts, whether the plaintiff is entitled to dower in the lands covered by these deeds, except the seven acres. We think she is. They were all voluntary deeds made in contemplation of marriage. It can make no difference in principle whether actual fraud was intended or not; their execution and delivery before the marriage, without her knowledge or means of knowledge, operated ¹²⁷ a legal fraud on what would be her rights in case of marriage. A desire to provide for the children of his former wife was both natural and proper, but as they had no legal claims upon his bounty, before he could rightly, in contemplation of marriage, dispose of his property to them for such purpose, it became his legal duty to disclose his purpose to one who, by her intermarriage with him, would become vested by law with a legal interest in the property that could not be divested without her consent. A father's legal duty to his children in no case requires him to practice a fraud on his wife or anyone else. If, after entering into a contract of marriage, if not before, he desires to make provision for his children by a former wife, it is his duty to communicate that fact to his intended wife, if thereby her rights are to be affected, that she may have an opportunity to say whether she consents to the disposition before consummating the agreement to marry. A failure to do this is, at least, a constructive fraud. In *Arnegaard v. Arnegaard*, 7 N. Dak. 475, 75 N. W. 797, where the question has received careful consideration upon principle and authority, it is said: "Whatever may have been formerly held, it has become settled in these latter days that

the purpose to deceive and defraud the other prospective spouse is imputed to the one who makes the attempted transfer, and conceals the fact until after marriage." In England, for reasons largely relative to the custom that there prevails of making a settlement in lieu of dower, called a jointure, before marriage, less consideration has been given to antenuptial conveyances by the husband, while such conveyances by the wife are uniformly held invalid. But in this country no such distinction is made; and the decisions are, as said in the case just cited, practically unanimous that the ¹²⁸ mere fact that a secret transfer was made after the engagement is conclusive on the question of fraud, so far as the right of dower is concerned. In some of the cases the element of actual fraud was shown to have existed, and some of the rulings are placed on that ground, but, as said in the case just referred to: "In the great majority of cases the broad rule is enunciated that a man owes to the woman to whom he is betrothed the utmost good faith, and that he cannot, consistently with that sacred obligation, secretly divest himself of property in which she would by marriage secure rights which would thereafter be beyond his control." This proposition is fully sustained by the decisions: *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Smith v. Smith*, 6 N. J. Eq. 515; *Youngs v. Carter*, 50 How. Pr. 410; affirmed on appeal, 10 Hun, 194; *Cranson v. Cranson*, 4 Mich. 230, 66 Am. Dec. 534; *Pomeroy v. Pomeroy*, 54 How. Pr. 228; *Davis v. Davis*, 5 Mo. 183; *Gainor v. Gainor*, 26 Iowa, 337; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211. See, also, *Stewart on Marriage and Divorce*, sec. 44; *Beach on Contracts*, sec. 1309.

In *Westerman v. Westerman*, 25 Ohio St. 500, it appeared that the wife, in contemplation of marriage with the plaintiff and after she had entered into the engagement, conveyed certain of her lands to two sons by a former marriage without consideration. The land had not been fully paid for, and the husband was compelled by suit to pay the balance of the purchase money. The court held the conveyance to be a fraud on the marital rights of the husband, that the wife was primarily liable for the amount due, and substituted the husband, for the purpose of indemnity, to the place of the vendor as against the land. This case recognizes the principle that the parties to a contract ¹²⁹ of marriage are bound by the obligations of good faith; and that neither can thereafter by voluntary gifts affect such legal rights as either may acquire in the

property of the other by marriage without the consent of the party to be affected.

After adverting to the rule in England that permitted a man, after contracting marriage, to make antenuptial conveyances of his lands, and the rigidity with which a like right was denied to the contemplated wife, and pointing out the reason for this difference, Daniels, J., in *Youngs v. Carter*, 50 How. Pr. 410, 10 Hun, 194, says: "There never was any good reason why the disability imposed in this respect upon the wife should not be equally applied to the conduct of the husband. If it was inequitable for her to convey away her property in anticipation of marriage, in order to prevent it from becoming subordinate to her husband's anticipated rights in it, it was equally so for him to do the same. The principle that restrained her should be equally as effectual over him; for if the act of one was a fraud, it was certainly no less so when it was performed by the other." In *Chandler v. Hollingsworth*, 3 Del. Ch. 99, the inability of the husband by an antenuptial conveyance to affect the wife's right of dower after the contract of marriage has been entered into, without her knowledge, is placed on the ground that dower is a property right which she acquires by the marriage, and that such conveyance is as much a fraud on her rights as a conveyance to defraud future creditors. Speaking of the "unjust discriminations made by the English courts of equity in withholding from the wife such protection as is given the husband against secret antenuptial settlements," and the reasons therefor, the chancellor says: "But in this country, ¹³⁰ clearly, the same reasons do not apply. Her dower is the only provision made by law for the wife out of the husband's real estate. Practically, it is a most important resource, and the only form of provision out of real estate enjoyed by her, except under wills. It does, in fact, to a large extent enter into the wife's expectations in contracting marriage, and properly so. It, therefore, ought to receive all the protection accorded to any marital right; to refuse it would, in this country, where jointures are unknown, render the right of dower precarious, if not wholly illusory."

It may be worth while to observe that the settlement of a jointure on a wife before marriage, in lieu of dower, freed the remaining lands of the husband from the marital right of the wife to dower in his remaining lands; and so antenuptial conveyances, under such circumstances, by a man under contract to marry, would not be open to the same imputation of

bad faith, as where no such settlement had been made. For the reason and origin of the rule in England as to antenuptial conveyances by the husband, see the intelligent account given by the chancellor in *Chandler v. Hollingsworth*, 3 Del. Ch. 115, 116.

This annunciation of the law does not interfere with the power of the contemplated husband to make provision for his children by a former marriage; it only requires that in doing so he shall not dispose of that which, by the law of marriage, the wife will acquire as a legal right incident to the relation. He may dispose of his property in this regard as he thinks proper, subject, however, to his wife's right of dower.

Judgment affirmed.

¹⁸¹ SPEAR, J., dissenting. I am of opinion that a widower who is contemplating a second marriage and has entered into a contract for that purpose has a legal, as well as a moral, right to convey a fair proportion of his real estate to his children by the deceased wife, and that love and affection is a sufficient consideration to support such conveyance. Nor is such conveyance in any sense an injustice to, much less a fraud upon, the second wife, and ought not to be even a disappointment to her. I am not ready to accept the implication of mercenary motives on her part which the opposite doctrine supposes.

The statute gives the widow dower in the lands of which her late husband died seised. The deceased did not die seised of the lands in controversy in this case, and hence the defendant in error is not entitled to dower.

DOWER.—A DEED OF GIFT ON THE EVE OF MARRIAGE by a man of all his property to his children, kept secret from his intended wife until after the marriage, is fraudulent and void so far as it deprives her of dower in the real estate conveyed by such deed: *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501. But see *Clark v. Clark*, 183 Ill. 448, 75 Am. St. Rep. 115, 56 N. E. 82.

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STATE v. HOGAN.

[63 Ohio St. 202, 58 N. E. 572.]

CONSTITUTIONAL LAW—TRAMPS.—A statute providing that any tramp who threatens to do injury to the person or property of another shall be imprisoned in the state penitentiary is not unconstitutional, as being arbitrary class legislation, nor as depriving persons of liberty without due process of law, nor as denying to them the equal protection of the law, nor as depriving them of the right to seek and obtain happiness and safety.

CONSTITUTIONAL LAW—TRAMPS.—A statute providing that any tramp who threatens to do injury to the person or property of another shall be imprisoned in the state penitentiary is not unconstitutional, as prescribing a cruel and unusual punishment.

CONSTITUTIONAL LAW—TRAMPS.—A statute defining a tramp to be a person who lives by begging, outside the county in which he has his home, and providing that if such person does, or threatens to do, any injury to the person of another he shall be imprisoned in the state penitentiary, is not unconstitutional as not being uniform in its operation, and as providing a punishment for an offense committed in one county different from punishment for a like act committed in another county.

CONSTITUTIONAL LAW—TRAMPS.—A law providing that a tramp found carrying a firearm or other dangerous weapon shall be imprisoned in the penitentiary is not unconstitutional, as a denial of the right to bear arms.

H. Bannon, prosecuting attorney, for the plaintiff in error.

G. M. Osborne, for the defendant in error.

206 SPEAR, J. The ground of the demurrer is the alleged invalidity of the statute on which the prosecution is based. That statute (Rev. Stats., sec. 6995) is: "Whoever, except a female or blind person, not being in the county in which he usually lives or has his home, is found going about begging and asking subsistence by charity, shall be taken and deemed to be a tramp; any tramp who enters a dwelling-house, or yard or inclosure about a dwelling-house, against the will or without the permission of the owner or occupant thereof, or does not when requested immediately leave such place, or is found carrying a firearm or other dangerous weapon, or does or threatens to do any injury to the person or real or personal property of another, shall be imprisoned in the penitentiary not more than three years nor less than one year; and any person may, upon view of any such offense, apprehend such offender, and take him before a justice of the peace, or other examining officer, for examination."

It is contended that the section contravenes our bill of rights, and section 26 of article 2 of the constitution, and the fourteenth amendment to the constitution of the United States.

The indictment is: "That Timothy Hogan, late of the county of Scioto aforesaid, on the fourth day of January, in the year of our Lord one thousand nine hundred, in the county of Scioto aforesaid, not being then and there a female person, and not being then and there a blind person, and not being then and there in the county in which he usually lives and has his home, and being then and there found going about begging and asking subsistence by charity, and being then and there a ²⁰⁹ tramp, did unlawfully and purposely threaten to do an injury to the person of another, to wit, to the person of Ferdinand C. Searl, Jr., contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio."

It will be noted that the specific charge is that the defendant, being a tramp, did unlawfully and purposely threaten to do an injury to the person of another. Our inquiry is, therefore, specially directed to the sufficiency of the indictment and the validity of the statute as to the acts charged, and the right of the state to prohibit and punish them as prescribed. In brief, the claim against the law is that it deprives persons of liberty without due process of law, and denies to them the equal protection of the laws, and deprives of the right of seeking and obtaining happiness and safety; that it is an act of a general nature but not of uniform operation throughout the state; and that it subjects the accused to a cruel and unusual punishment. And it is specifically urged that the act does not operate uniformly because it provides a punishment for an offense committed in one county different from punishment for a like act committed in another, inasmuch as the offense of threatening to do injury to the person or property of another in a county other than that of the residence of the accused may be punished by incarceration in the penitentiary, while if done in the county of his residence is at most a misdemeanor.

It is conceded that the law is of a general nature. The test of uniform operation, and with respect to the required conformity to the "law of the land" and to the requirement of "due process of law," seems to be that if the law under consideration operates equally upon all who come within the class to be affected, ²¹⁰ embracing all persons who are or may be in like situation and circumstances, and the designation of the class is reasonable, not unjust nor capricious or arbitrary, but based upon a real distinction, the law does operate uniformly, and if, added to this, the law is enforced by usual and appropriate methods, the requirement as to "due process of law"

is satisfied. As said by Mr. Justice Field, in *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. Rep. 231: "Such legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes . . . adapted to the nature of the case." It is not essential that it operate upon all the inhabitants of the state, nor is it an objection that it distinguishes a class. In the very nature of things, the law must, in dealing with persons and property and governmental divisions, group persons or objects having similar attributes into classes, and the general assembly must legislate appropriately for each, and unless it is made manifest that such legislation is directly forbidden by the constitution, or the attempted classification is purely arbitrary, unreasonable, unjust, or capricious, the power of the general assembly to thus classify cannot be successfully challenged. Nor is it an objection to a penal statute that it does not apply to all persons who might by any possibility commit the act interdicted. It is for the legislature to determine how far to go in order to afford the desired protection to society. The exemption of some, where it does not interfere with the rights of others, is not open to objection on constitutional grounds. The principle is illustrated in the statute under review. Females and blind persons are not included within its terms. This, ²¹¹ presumably from considerations of humanity, but principally because but little, if any, danger is threatened from such, and this exemption has not met with objection in this case. The act in question undertakes to define a tramp, or vagrant, by stating what acts shall constitute such character. It is, in the main, the old method of describing a vagrant, and vagrancy, time out of mind, has been deemed a condition calling for special statutory provisions, i. e., such as may tend to suppress the mischief and protect society. These provisions rest upon the economic truth that industry is necessary for the preservation of society, and that he who, being able to work, and not able otherwise to support himself, deliberately plans to exist by the labor of others, is an enemy to society and to the commonwealth. The statute applies to all of the class described, no matter where in the state they may be found; it does not subject any coming within the designation to a different restriction, or accord to any a different privilege under like conditions. So that, unless there is controlling force in the objection that the statute seeks to punish an offense committed in one

county in a different way from a like offense committed in another county, the law cannot be held wanting in uniformity of operation. If the rule is that every criminal act of similar nature or character must meet with like condemnation and like punishment, without respect to whether the circumstances under which it is committed are the same or are different, then the statute in question cannot be maintained. But is that the rule? Is it not manifest that a criminal act committed under some circumstances and in some situations may be followed by consequences infinitely more serious than if committed under different circumstances? ²¹² Take the crime of forcibly breaking into a dwelling-house with intent to steal or commit a felony. If done in the night season it is burglary and punished accordingly; if in the day season it is punished otherwise, and always has been; at least the distinction in the two offenses has always been observed. Why? There can hardly be any difference between them as to moral turpitude. The reason is simply that the consequences as to injury to persons, by bodily harm to the inmates of the house, or by terrorizing them, are immensely greater in the one case than in the other, and the chances of detection less. Shall the burglar be heard to complain because he is punished with more severity than the mere housebreaker? Again, we have a statute (section 7024) making it a penitentiary offense for a teacher to have sexual intercourse with any pupil with her consent while under his instruction, and this without respect to the age of either. Shall a seducer who offends against this statute be heard to say that he should not be punished because another man, not a teacher, had he accomplished the ruin of the same woman, would have gone scot free? Hardly. One Brown made that plea to this court, but the court (*Brown v. State*, 38 Ohio St. 374) refused to entertain it, and held the law to be valid. Here, too, the moral turpitude may not be greater, but there is an essential difference in the condition of the parties. The opportunity for winning trust, confidence, and influence is likely to be much greater in the one case than in the other. Hence, a similar act by the one is severely punished, while if by another no criminal punishment may follow. The distinction sought to be drawn is illustrated further by the United States statutes relating to mutiny, piracy, the slave trade, ²¹³ and other offenses upon the high seas: U. S. Rev. Stats., secs. 5359-5384. Piracy, by the law of nations, is any robbery or forcible depredation on the high seas without lawful authority, done *animo furandi*, and offenses

against this law, where the party is brought into or found in the United States, are punished by death. Congress, under authority of article 1, section 8, of the constitution, has further defined and provided for the punishment of piracy, and by the provisions of the sections referred to, robbery on the high seas is made piracy and punishable with death. So, too, any captain or mariner who piratically and feloniously runs away with a vessel, or any goods or merchandise thereon, of the value of fifty dollars, or voluntarily yields such vessel to pirates, or any seaman who forcibly endeavors to hinder his commander from defending the ship or goods, or makes revolt in the ship, shall be adjudged a pirate, and suffer death. So, too, any person who, on the high seas, willfully and corruptly casts away or otherwise destroys any vessel of which he is the owner in whole or in part, with intent to injure an owner, underwriter, or merchant having goods thereon, and any person not being an owner who, on the high seas, willfully and corruptly casts away or otherwise destroys any vessel to which he belongs, the property of any citizen, shall suffer death. So in regard to the slave trade it is provided that anyone being of the crew of any foreign vessel engaged in the slave trade, or of any vessel owned, in whole or in part, or navigated by any citizen, who forcibly confines or detains on board such vessel any negro or mulatto with intent to make such negro or mulatto a slave, or offers to sell such person, or anywhere on tide water transfers to any vessel such ²¹⁴ person, or delivers on shore from on board such vessel such person, with intent to make sale of such person, and whoever, being of such crew, seizes any negro or mulatto with intent to make such person a slave, or decoys or forcibly brings or carries or receives such person from such offender, is a pirate and shall suffer death. Acts of a similar nature, but of less turpitude, are punished by heavy fines or by imprisonment at hard labor from two to seven years, or both.

Has anyone ever heard of a jack tar accused of mutiny, or a captain of piracy, or a miscreant engaged in the slave trade, successfully maintaining that because insubordination by an employé on the land, or robbery, or the dealing in human flesh, is punished in a different manner, or with less severity, or not punished at all, is a reason why he should not be convicted and have his miserable existence terminated on the gallows or at the yard-arm? And yet everyone familiar with criminal law will at once recognize the enormous difference between the punishment meted out under these sections and that inflicted

upon persons guilty of offenses of like nature within domestic waters or on land, and it must be manifest that the ground for distinction is found in the differing circumstances. One prominent consideration moving to the legislation doubtless was that piracy and the slave trade were offenses not only against humanity, but against civilization, committed under circumstances making successful resistance by the intended victim next to impossible, and detection and apprehension of the guilty party extremely difficult. Piracy had become an organized system of robbery, often, nay generally, involving murder, and extending in its operation over the ²¹⁵ whole globe, and the slave trade a system even worse, combining as it did remorseless greed and barbarous cruelty inflicted upon scores and hundreds of innocent victims, and the intent of the law was not, and is not, so much to punish or reform the individual offender as it is to break up and destroy the practice. To accomplish this it was matter of stern necessity to make all participation in any act which in its nature aided the main purpose, a grave, and usually a capital offense, punishable with unusual severity, and technical objections could not be allowed to stand in the way of the great purpose to be accomplished.

Does it not seem that, in principle, we have a parallel case? Speaking of the class, the genus tramp in this country is a public enemy. He is numerous and he is dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman, and child, in so far as they do not promptly and fully supply his demands. He is a thief, a robber, often a murderer, and always a nuisance. He does not belong to the working classes, but is an idler; he does not work because he despises work. It is a fixed principle with him that, come what may, he will not work. He is so low in the scale of humanity that he is without that not uncommon virtue among the low of honor among thieves. He will steal from a fellow-tramp, if in need of what that fellow has, and will resort to violence when that is necessary. So numerous has the class become that the members may be said to overrun the improved parts of the country, especially the more thickly settled portions. They beat their way upon railroads and other lines of communication, and resent with vicious violence any attempt on the part of the railroad employes and others to drive them off. They ²¹⁶ plod through the rural districts, appearing suddenly at farm houses, and other houses where it is probable that unprotected women and children may be found, and brutally coerce

compliance with their demands for food or whatever else they may desire, terrorizing the people and adding still further discouragements to life in isolated places. It will not be understood that there may not be differences in tramps. There may be. Some may be less worthless and vicious than others; but all pirates were not alike brutal and bloody. We read of one who is said to have been "as mild mannered a man as ever scuttled a ship or cut a throat." Yet they are all denounced alike as pirates. A specially discouraging feature of the tramp life is that it offers captivating attractions to a class of idle young men, usually dissipated, who become restive under control, and join the tramp army in part from a craving for new scenes and daring adventures, and a license which is denied them in the home neighborhoods. They may at first be somewhat guarded in conduct, but that quite soon disappears and they become as importunate and reckless as the oldest vagrant. Although not connected by any tie which insures honorable treatment one of another, the tramps nevertheless have sufficient organization to maintain a code of signs by which those who follow may know the treatment received by those who have shortly before preceded, and to be advised of places for common rendezvous. They thus are able to avoid locations where the citizens resolutely refuse them, or where the laws are rigidly enforced, and confine their depredations to sections where the people meekly submit, and are enabled to congregate, and they do congregate, in such numbers at agreed points as to become a source of serious ²¹⁷ menace to the peace and good order of such neighborhoods. The whole system has become so gross an abuse as to require the strong hand of the law for its suppression, and the abuse is so patent that courts cannot properly refuse to take judicial notice of it. It is to be constantly borne in mind that the act in question is intended to afford some adequate security to the public against dangers to be apprehended from the class described, all of whom, from their want of honest employment or from their vicious pursuits, may well be considered as dangerous to society. This security cannot be obtained by attempts at enforcing this or any law if the efforts of the prosecuting officers in the interest of the people are to be overborne by technical and unsubstantial objections. This much as to the necessity of some law. Why not this law? Is there not sufficient difference between the condition and opportunity of a pauper in his own county and the same character abroad, and between the situation of the people of the county where

the pauper resides and those of distant neighborhoods, to warrant a legal distinction? In the county of his residence the pauper, when in necessitous circumstances and unable to supply his own physical needs, and he is often in that condition, has the legal right to call upon the poor authorities for support, and those authorities have the right and the power to use the proper public funds for that purpose. Ordinarily, such persons become quite well known, and the people are less apt to be terrified by them and induced through fear to yield to their demands than where they are strangers, and the paupers themselves are much less likely to become ruffians when at home and comparatively isolated than when they have burned their bridges, so to speak, and started on a tramp in ²¹⁸ pastures new, and joined their fortunes with others of like ilk. In short, tramping makes a different character of the same person. And why may they not, when thus grouped, be regarded as a class? The grant of legislative power by section 1 of article 2 of our constitution is as ample as that given Congress by the federal constitution as to piracy, and we deem the power broad enough to warrant the general assembly in constituting the tramp a class by himself and legislating for his suppression.

The objection that the act prescribes a cruel and unusual punishment we think not well taken. Imprisonment at hard labor is neither cruel nor unusual. It may be severe in the given instance, but that is a question for the law-making power: *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. Rep. 930; *Cornelison v. Commonwealth*, 84 Ky. 583, 2 S. W. 235. The punishment, to be effective, should be such as will prove a deterrent. The tramp cares nothing for a jail sentence; often he courts it. A workhouse sentence is less welcome, but there are but few workhouses in the state. A penitentiary sentence is a real punishment. There he has to work and cannot shirk.

But it is insisted that the bill of rights is infringed because the act forbids the tramp to bear arms. The question was not involved in this prosecution, but we see no real difficulty in it. The constitutional right to bear arms is intended to guarantee to the people in support of just government such right and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he employs those arms which he ought to wield for the safety ²¹⁹ and protection of his country, his person, and his property, to the annoyance and terror and danger of its

citizens, his acts find no vindication in the bill of rights. * That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others. Going armed with unusual and dangerous weapons to the terror of the people is an offense at common law. A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people: *Knight's Case*, 3 Mod. 117; *State v. Huntly*, 25 N. C. 418, 40 Am. Dec. 416; *State v. Roten*, 86 N. C. 701. And statutes punishing such offenses are constitutional: *Galvin v. State*, 6 Coldw. 284; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8.

Statutes intended to suppress the tramp nuisance have been enacted by a number of the states of the Union, notably Vermont, New Hampshire, Massachusetts, Rhode Island, Pennsylvania, Indiana, Iowa, and Wisconsin. These statutes are like that of Ohio so far as classification is concerned and nearly all prescribe a like punishment. All do not make a distinction between acts committed in a county in which the tramp does not reside and similar ones in the county of his residence, but most do. The validity of the Wisconsin statute is doubted in *Johnson v. Waukesha Co.*, 64 Wis. 281, 25 N. W. 7, but apparently sustained in *Murphy v. State*, 86 Wis. 626, 57 N. W. 361. That of Pennsylvania, where punishment is committal for not more than one year in a workhouse, is apparently sustained in *Commonwealth v. Gill*, 7 Week. Not. Cas. 557. To what extent these acts have been sustained or invalidated by decisions in the other states we are not apprised, but the enactments themselves ²²⁰ indicate that the legislatures of those states have considered that the situation calls for stringent measures of suppression.

We are of opinion that the law in question is one calculated to secure the repose and peace of society, and that it is not open to the objections made against it.

Exceptions sustained.

VAGRANCY.—ON THE CONSTITUTIONALITY OF STATUTES designed to suppress vagrancy, see the note to *In re Thompson*, 38 Am. St. Rep. 643-646.

CRIME.—ON THE POWER OF LEGISLATURES to declare acts criminal, see the monographic note to *Booth v. People*, 78 Am. St. Rep. 235-274.

ON SPECIAL AND CLASS LEGISLATION, see the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789.

KING v. KING.

[63 Ohio St. 363, 59 N. E. 111.]

CONTRACTS.—IF ONE OF TWO CONSIDERATIONS for a contract is void, merely for insufficiency and not for illegality, the other, if sufficient, will support the contract.

CONTRACTS NOT TO MARRY are void, as against public policy, but are not illegal.

CONTRACTS TO CARE FOR ANOTHER, WITH AGREEMENT NOT TO MARRY.—If a woman agrees to live with and take care of a man during his life, and not to marry during that time, in consideration of his promise to make her comfortable and well off, and she fully performs such services, but he fails to keep his agreement, she may, upon his death, maintain an action against his estate on the contract. In such case, although the promise not to marry is void, the main consideration is the labor and care, which, when performed, is sufficient to support the contract.

Action upon a contract by which one James Howland agreed with his niece that if she would refrain from marriage while he lived, and would live with and take care of him during that time, he would provide for her amply sufficient to make her well off and comfortable. A judgment for plaintiff in the court of common pleas was reversed in the circuit court and an appeal taken therefrom to this court.

J. F. Clark and G. L. Phillips, for the plaintiff in error.

Smith & Blake and Marvin & Shupe, for the defendants in error.

363 **SPEAR, J.** The sole ground of reversal is that the contract is void, because against public policy, being in restraint of marriage. Hence there could be no recovery. That contracts in restraint of marriage are void, as being contrary to the public policy of the law, is conceded. But the question here is whether the contract to render service, fully performed by the one party, so rests upon the promise not to marry, or is so tainted by that part of the agreement, as to be incapable of enforcement. The consideration moving to the agreement on the part of Howland to make ample provision for his niece was, on its face, twofold: One, the promise to perform the service agreed upon; the other not to marry during the continuance of such service. The first was a valid promise and of itself sufficient to support the promise of the other party; the second was a void promise, not affording any consideration whatever. As given in text-books, and numerous decisions, the general rule

is that if one of two considerations for a promise be merely void, the other will support the promise, although if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions, as will be shown later on. That is, if one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract: *Widoe v. Webb*, 20 Ohio St. 435, 5 Am. Rep. 664; *Metcalf on Contracts*, 246; *Chitty on Contracts*, 988; 1 *Parsons on Contracts*, 456; *Comstock on Contracts*, 24; *Pikard v. Cottels*, Yelv. 56; *Bliss v. Negus*, 8 Mass. 51; *Carleton v. Woods*, 28 N. H. 290; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *King v. Sears*, 2 Crompt. M. & R. 370 48; *Erie Ry. Co. v. Union etc. Co.*, 35 N. J. L. 240; *Bradburne v. Bradburne*, Cro. Eliz. 149. This distinction between a contract merely void and an illegal contract would seem to be an important one. Courts, as a general proposition, are open for the enforcement of contracts, not for their destruction. So that where parties have deliberately entered into a contract valuable to them, and one has received the full advantage of it, the general policy of the law is to exact proper performance by him who has thus obtained the advantage, and some substantial defect should be shown before a court will refuse enforcement; a mere technical objection should not prevail. Now, a void contract is one which has no legal force, and which, for that reason, cannot be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins, and for that reason is nonenforceable. There is no provision, either by statute or at common law, which enjoins upon any particular person the duty to marry, nor can anyone be punished for not marrying. To marry or not to marry is left to the free choice of all who are eligible to marriage. Hence, to omit to marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law or of placing parties who may have entered into it outside the pale of the law.

³⁷¹ But aside from this, in the present case the promise on the part of the woman which was of value to the man was the promise to care for him. The promise not to marry was a

mere incident to the main purpose, entered into simply because it was supposed that, by remaining single, the woman could the better perform her contract. It was immaterial to the man whether she married or not so long as she fulfilled her promise as to care. In other words, the promise to remain unmarried did not enter into or become part of the substance of the general agreement; that agreement was for the performance of services. If the performance was adequate and the services rendered in a satisfactory manner, their value could neither be enhanced nor diminished by the fact that they had been rendered by a single woman rather than a married one; so that had the plaintiff married, yet if she satisfactorily performed her contract, the recipient of the services would lose nothing by the fact of marriage. As matter of fact she did not marry, whether because of the contract or for reasons wholly apart from it, is not material, for she was under no obligation to marry nor to refrain from so doing. She did perform the service; that the verdict and judgment of the common pleas settles to all intents and purposes for the present inquiry. As above stated, the promise not to marry, although void because against public policy, was not illegal as against positive law, and it is not easy to perceive how its presence in the contract, or its observance by her, or both facts, could place the parties in what is termed in *pari delicto*, i. e., in a position where the law should adjudge them guilty of its violation, and hence refuse relief for that reason in the face of the fact that the claimant had fully performed. In such case the maxim "*In pari delicto melior est conditio possidentis*" has, in reason, no application, and we think ought not to have application in law.

Courts refuse to enforce or recognize certain classes of acts because against public policy on the ground that they have a mischievous tendency, and are thus injurious to the interests of the state, apart from illegality or immorality. A contract in restraint of marriage is of this nature. But, as before suggested, it does not follow that all contracts which may have an element of insufficiency, and may be void as to one feature, are incapable of enforcement, or even that all that are illegal will not be enforced. Decisions are abundant in support of the proposition that even where the acts of the parties have been in violation of positive law the contract may, under some circumstances, be enforced. A case in point is *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211. The bank's charter forbade a director, under penalty of fine and imprisonment, to bor-

row money from the bank. It was claimed that the act of thus lending by the bank was null and void; that no rights could accrue from it, and hence no action could be had by either party based upon it. The court held, however, that: "Contracts made in violation of statute are not necessarily incapable of enforcement because of their illegality. Whether the courts will enforce them or not is a question of public policy, and they will be enforced when it may be adjudged that such policy requires their enforcement." Robinson, J., in the opinion, remarks that: "Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise, even under contracts of this character, in which ³⁷³ the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy," and cites 1 Story's Equity Jurisprudence, section 298. This policy of the law finds expression in our statutes authorizing the recovery back of money lost at gaming, and the decisions under them: See, also, Burkholder's Appeal, 105 Pa. St. 31. To justify refusal of relief to the plaintiff on the ground referred to, the court ought to be ready to hold that the public mischiefs would be greater by permitting a party to recover who had made and performed a contract otherwise well founded, but embracing an agreement not to marry while in its performance, than by permitting the other party to have the full benefit of meritorious service for nothing, thus repudiating his agreements, all of which were legal and based upon at least one consideration entirely adequate and wholly lawful. We are not prepared to make such a holding, but are clearly of opinion that no mischiefs to the public would result from sustaining a right to recover in a case like the present comparable to those which would follow a contrary holding, one which would encourage the violation of contracts and the repudiation of just obligations after full value had been received.

Other phases of the case are argued by defendants in error. The printed record presented embraces only the question here treated. It is not the duty of the court to hunt through portions of the record not printed in the quest of other reasons why the judgment of the common pleas should have been reversed, and we decline to do so.

The judgment of the circuit court will be reversed and that of the common pleas affirmed.

CONTRACT.—THOUGH PART OF THE CONSIDERATION is merely void, a contract may be supported by the residue of the consideration, if good per se; but if part is illegal, it vitiates the whole: *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370. See, also, *Emshwiler v. Tyner*, 21 Ind. App. 347, 60 Am. St. Rep. 360, 52 N. E. 459.

RESTRAINT OF MARRIAGE.—On contracts in restraint of marriage, see *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151. On devices in restraint of marriage, see *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. 886; *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391, 46 N. W. 422; note to *Coppage v. Alexander*, 38 Am. Dec. 156-161.

PEOPLE'S AND DROVERS' BANK v. CRAIG.

[63 Ohio St. 374, 59 N. E. 102.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION.—If a note is indorsed for collection and sent to the place of payment, the power of the person receiving it is limited to collection, and he cannot sell or transfer the note.

NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION—PAYMENT BY VOLUNTEER.—If a note is indorsed for collection, and the person receiving it remits the amount thereof out of his own funds, such transaction is a payment and extinguishment of the note, and not a transfer thereof.

NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION—PAYMENT.—If the person receiving a note indorsed for collection remits the amount thereof to the holder out of his own funds, with the assent of the maker, the latter may be held liable as for money paid to his use, or on the note as a reissued note, but as to nonassenting makers there is no liability for such payment which extinguishes the note as to them.

NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION—PAYMENT BY VOLUNTEER—SUBROGATION.—A person who receives a note indorsed for collection, and remits the amount thereof to the owner out of his own funds, without the assent of the maker, is a mere volunteer, and not entitled to subrogation.

H. Jones, for the plaintiff in error.

M. Gardner, for the defendant in error.

³⁸⁰ **BURKET, J.** The unknown custom of the bank and its private manner of conducting its banking business could not have the legal effect of changing the rules relating to negotiable instruments, and therefore this case must be determined by a consideration of what was in fact done by the holder of the note, the bank, and not by the private customs and manner of ³⁸¹ transacting the business of the bank. The holder indorsed the note for collection and forwarded it with that in-

dorsement to the bank, and the bank received it for collection, and entered it on its collection-book and placed it among its collections, and afterward drew a draft on its Cincinnati correspondent for the amount of the note, and forwarded the draft in payment of the same to the one from whom it had so received it, and then placed the note into its cash items without stamping it paid. As to the holder of the note who so forwarded it for collection, this was a payment and extinguishment of the note, and not a transfer to the bank. The draft to pay the note was forwarded by Mr. Robinson, the cashier, either in his individual capacity or in his official capacity as cashier. If in his individual capacity, it was clearly a payment and extinguishment of the note. If in his official capacity as cashier, his act was the act of the bank, and was a voluntary payment, and not an acquiring of the note by transfer, because the note was not sent to the bank to be by it transferred, but to be by it collected—that is, that it should receive payment, and upon payment the note should become extinguished. The indorsement was a restricted one, and the bank had no authority to do more than receive payment, and it could not keep the note alive after payment for any purpose. Payment, even by a volunteer, was the death of the note. A person who volunteers to pay the note of another cannot by such payment make himself the owner of the note without the knowledge and consent of the holder thereof. He cannot act both as buyer and seller at the same time, bargaining with himself: Randolph on Commercial Paper, sec. 720; Daniel on Negotiable Instruments, sec. 698d; ³⁰⁰ National Butchers' etc. Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515, 22 N. E. 1131; First Nat. Bank v. Reno County Bank, 5 Cin. Law Bull. 611, 3 Fed. 257.

There are some cases both in England and this country in which a stranger paying a note has been held to be a purchaser, subject to all equities of other parties; but in all those cases there was something in the transaction itself showing an intention at the time to become such purchaser, coupled with a power in the holder to sell and transfer the instrument.

The bank furnished the money and remitted it to the holder of the note as payment, and the holder received it as payment and had no information that the money was not paid by the makers. Such a transaction is a payment and extinguishment of the note, and not a transfer thereof.

As Mr. Robinson, the maker and also cashier, made the transaction, he must have assented thereto, and become bound

to the bank by such assent for a repayment of the money so paid to his use; or an action might be maintained by the bank against him on the note as a reissued note; but as to the other makers who did not so assent, there was no reissue of the note, and no liability for the money so paid without their knowledge or consent: Randolph on Commercial Paper, sec. 1425.

The doctrine of subrogation has no application to payments made by a mere volunteer, and the bank in this case was purely a volunteer. There was no lien or security in the case to be kept alive by subrogation, and therefore it is useless to further consider that question in this case: Randolph on Commercial Paper, sec. 1439.

The controlling facts in this case were conceded on the trial, and the jury could not lessen the force of those facts by a consideration of the custom of the ^{ssa} bank and its manner of doing business, and therefore those customs and manner of doing its business were immaterial, and the court was right in directing a verdict in accordance with such conceded facts.

The plaintiff having no cause of action upon the conceded facts on the trial, the rulings of the court upon the demurrers and motion are immaterial and need not be considered.

Judgment affirmed.

THE INDORSEMENT FOR COLLECTION of a draft or check is not a transfer of the title to the indorsee, but merely constitutes him the agent of the indorser to present the paper, demand and receive payment, and remit the proceeds. Where the bank to which such an indorsement is made makes an assignment for creditors, its assignee does not acquire any title to such paper: National Butchers' etc. Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515, 22 N. E. 1031. See, further, Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779; Cussen v. Brandt, 97 Va. 1, 75 Am. St. Rep. 702, 32 S. E. 791; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193; note to Allen v. Merchants' Bank, 34 Am. Dec. 307.

Am. St. Rep., Vol. LXXXI—41

IN RE PRESTON.

[68 Ohio St. 423, 59 N. E. 101.]

CONSTITUTIONAL LAW—WEIGHING OF COAL BEFORE SCREENING—RIGHT TO CONTRACT.—A statute making it “unlawful for any mine owner, lessee, or operator of coal mines, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employé sending the same to the surface and accounted for at the legal rate of weights fixed by law,” has no other object than to prevent the making of contracts between operators and miners whereby the former shall become bound to make, and the latter entitled to receive, just compensation according to the care and skill of the miner, and is unconstitutional as an unwarrantable invasion of the right to contract.

Habeas corpus. The prosecution is founded on the act of March 9, 1898 (93 Ohio Laws, 33), entitled “An act to provide for the weighing of coal before screening.” The provisions of the act are as follows: “Sec. 295a. It shall be unlawful for any mine owner, lessee, or operator of coal mines in this state employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employé sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Ohio. Sec. 295b. The provisions of this act shall also apply to the class of workers engaged in mines wherein the mining is done by machinery, known as loaders; whenever the workmen are under contract to load by the bushel, ton, or any quantity, the settlement of which is had by weight, the output shall be weighed in accordance with the provisions of this act.” Section 295c provides the penalty for the violation of this act.

Arnold, Morton & Irvine and T. A. Jones, for the petitioner.

J. M. Sheets, attorney general, D. J. Ryan, W. T. Lewis, J. E. Todd, and S. W. Bennett, for the respondent.

438 SHAUCK, C. J. There is no authority for the detention of the petitioner unless the act of the general assembly set out in the statement of the case is constitutionally valid.

That the constitution gives inviolability to the right to make contracts, and that the legislature may deny the right only

when it is required for the general welfare and when it is promotive of public health or morals, are propositions established by familiar authorities and admitted by the attorney general. We have, therefore, to consider only the purpose of this enactment and the nature of the contract which it assumes to forbid. Its purpose is to terminate the rights heretofore universally recognized in this state, and often exercised, of determining by contracts voluntarily entered into between miners and operators the mode in which the basis of compensation to be made by the latter to the former should be ascertained. Counsel for the state expressly disclaim any authority in the legislature to determine the price to be paid for mining coal, and it is true that no such authority is assumed in this act. By the method of payment heretofore in use, in which compensation was determined upon the basis of screened coal miners have become entitled to receive and operators have become bound to make compensation, having regard to the skill and care exercised by the miner in the prosecution of his work. The effect of the act is that the total compensation to be paid by an operator is to be determined by agreement, but that it must be paid to miners without discrimination on account of their skill and care. Why the general assembly selected ⁴³⁹ this class of laborers for discrimination—why they are deemed less entitled than others to compensation which encourages merit by rewarding it—we do not know nor inquire. For however unjust to this class of laborers the act may be, we can inquire only whether the general assembly had power to pass it. It is suggested as the basis of the act that frauds may be perpetrated in the screening and weighing of coal under the contracts heretofore entered into. To this suggestion it is sufficient to answer that if such danger exists it may well justify appropriate legislation for the prevention of such fraud. But this legislation does not seek to prevent fraud nor to provide for the health or safety of those engaged in mining. Its sole purpose is to establish a uniform standard of compensation among those upon whom it operates. That is, so far as skill and care are concerned, it establishes a uniform standard of earning capacity. The standard thus to be established for all must necessarily be that of the least efficient, since their efficiency cannot be increased by legislation. To withhold from merit its reward may be a favorite object of socialism, but it is inimical to the individual rights which are preserved by the constitution. Acts not distinguishable from this in any sub-

stantial respect have been held repugnant to similar constitutional provisions: In re House Bill etc., 21 Colo. 27, 39 Pac. 431; Commonwealth v. Brown, 8 Pa. Super. Ct. 339; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Ramsey v. People, 142 Ill. 380, 32 N. E. 364. We are aware that divided courts have reached the opposite conclusion: State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000; State v. Wilson, 61 Kan. 32, 58 Pac. 981. But in both cases what we regard as the correct view is expressed in the dissenting opinions. The views which prevailed in the cases lastly cited seem to ⁴⁴⁰ be entertained by those whose minds have not become entirely divorced from the view once urged, but long since abandoned, that constitutional limitations are mere admonitions to the general assembly, and that they do not serve to annul legislative enactments inconsistent with their provisions.

This act may be invalid for other reasons, but our decision is placed upon the ground that it is an unwarranted invasion of the rights of miners and operators to make contracts by which the former shall be entitled to receive, and the latter obliged to make compensation according to the value of the service rendered and received.

Petitioner discharged.

CONSTITUTIONAL LAW.—IF COAL MINERS are paid by weight, a statute that deprives them and their employers of the right to fix upon the amount of coal mined or the amount due for mining it, in any manner mutually satisfactory, is unconstitutional: Harding v. People, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624.

UNION CENTRAL LIFE INSURANCE COMPANY v. HILLIARD.

[63 Ohio St. 478, 59 N. E. 230.]

INSURANCE—LIFE—MINORS.—A policy of insurance on the life of a minor, payable to him, if living at maturity, and to his executors, administrators or assigns, if he dies before maturity, together with the notes given by him for premiums thereon, is not void, though voidable. Nor is the minor's assignment of the policy during his minority necessarily void.

INSURANCE—LIFE—MINORS—CONSIDERATION FOR CONTRACT.—The obligation of an insurer to pay a policy on the life of a minor to him, if living at maturity, on the happening of the event contemplated, is a sufficient consideration to support a promise to pay premiums, whether such promise is made by the insured alone, or by another jointly with him.

INSURANCE—LIFE—WAGERING CONTRACT.—If a borrower from an insurer, as additional security for a loan, takes a policy on the life of another and assigns it to the insurer, such policy is not void as a wagering contract, though procured by a person who has no insurable interest in the life of the insured, and who joins in a promise evidenced by notes to pay the premiums.

INSURANCE—LIFE—USURY.—If a borrower from an insurer procures a loan upon a lawful rate of interest, giving a real estate mortgage as security and also a life insurance policy procured by him on a life in which he has no insurable interest, and for which he signs premium notes with the insured in order to give value to the policy as collateral security for the loan, the premiums paid and agreed to be paid upon such policy cannot be regarded as additional interest for the loan so as to render it usurious.

C. Follett and Maxwell & Ramsey, for the plaintiff in error.

J. V. Hilliard, J. M. Swartz, and Kibler & Kibler, for the defendant in error.

⁴⁸⁸ **SPEAR, J.** The contention here relates wholly to the legal effect of the transaction involving the giving of the notes hereinafter referred to. The first claim of the company was upon notes and mortgage given for a loan of money to John Strawn, and the other upon notes and mortgage given to secure a sum advanced by the company to enable the deceased to pay premiums upon a policy of life insurance issued by the company on the life of one Edward L. Roberts, and by him assigned to the company as collateral security for the loan made to Strawn. It was claimed by the administrator and heirs and found by the common pleas and circuit courts that the loan of money and the issuing of the policy were parts of one and the same transaction, and were a mere device on the part of the company for securing upon the loan a larger rate of interest than the legal rate; that the transaction was usurious, and that the company was entitled only to the face of the loan with interest at six per cent, less certain payments which they claimed had been made. Pertinent facts necessary to an understanding of the questions presented follow:

April 30, 1889, John Strawn applied to the Union Central Life Insurance Company for a loan of twelve thousand five hundred dollars for five years with interest at seven per cent, payable annually, tendering as security a mortgage upon two hundred and forty-four acres of land, being part of the land involved in this suit. The company declined to loan the amount on the security alone ⁴⁸⁹ of the land, but would do so if, added thereto, there were given the additional security of a

life insurance policy. Thereupon, May 30, 1889, Strawn executed and delivered to the company five principal notes for the loan, one for ten thousand five hundred dollars, due in five years, and four for five hundred dollars each, due in one, two, three, and four years, with interest coupons attached to each for annual interest, and a mortgage to secure the same on the land referred to. Also another mortgage on the same land to secure the payment of four premium notes of five hundred and thirty-two dollars each, due in one, two, three, and four years, and to bear interest at eight per cent after maturity, the notes being executed by Edward L. Roberts and John Strawn, and given for the payment of annual premiums on the policy of insurance issued by the company on the life of Roberts. The policy was a ten year annual life rate endowment policy which required all payments to be paid up in ten years. In order to give the policy value as collateral the premium for five years was paid in advance; that is, five annual premiums at the regular rate were properly discounted and thus paid at the inception of the policy. This payment was made by the advance of the amount by the company and evidenced by the notes of the insured (Roberts) and John Strawn, secured by mortgage by Strawn as stated above, the notes being treated by the company, as between it and the insured, as cash. The policy was then assigned by Roberts to the company as collateral to the mortgage given to secure the larger loan. Roberts was a minor, eighteen years of age, a grandson of Strawn, and the trial court found Strawn had an insurable interest in the life of Roberts solely from the fact that Roberts was his grandson, no other relation existing between them giving such interest. It further found that the ⁴⁹⁰ policy is not a wagering policy, and for that reason not illegal, void, or without consideration. Strawn himself was not an insurable subject on account of his advanced age, and hence the requirement that the policy be upon the life of another and that Strawn should secure the payment of the premiums. The grandson was without means and unable to pay them. The policy was made payable to the insured, if living at maturity, and in case of death prior to maturity, to his executors, administrators, or assigns. It acknowledged receipt of five hundred and thirty-two dollars, the first premium, and the four notes of like amount payable in one, two, three, and four years, secured by mortgage, and containing a provision that failure to pay any one of the notes at maturity would give the company the right at its election to avoid the policy, but

it does not appear that the company had exercised that right. It was the habit of the company to require the assignment as collateral security of policies in the manner above mentioned, although there was no written rule to that effect. The court found that the mortgage was ample security at the time the loan was taken independent of the assignment of the policy. Many facts are found by the trial court, but the foregoing statement is believed to embrace all that are necessary to an understanding of the points decided.

No substantial claim of fraud or deceit or circumvention practiced by either party is made; nor is it seriously claimed that the transaction was misunderstood by the parties, either as to its terms or legal effect. The issues are issues of cold law.

Three grounds are stated and argued by counsel for defendants in error as supporting the conclusion of the courts below that the transaction is void and ⁴⁹¹ not enforceable against the administrator of John Strawn, viz.: 1. Because of the minority of Edward L. Roberts and his inability to make a valid contract for insurance or to assign the same; 2. That the insurance was void because John Strawn had no insurable interest in the life of Edward L. Roberts, and the same was, therefore, a wagering policy; 3. Because the whole transaction connecting the life insurance feature with the loan was a mere shift and device to compass usury, and was, therefore, illegal.

As to the first proposition it is sufficient to say that a contract by a minor is voidable only, and that at his election. The other contracting party cannot avail himself of the lack of power on the part of the minor to conclusively bind himself as a reason for refusing performance on his part. Hence the contract cannot be said to be absolutely void. In the present case the record does not show that the insured has elected to avoid the contract, although it does show that he has long since reached his majority. Nor is he a party in the case, and his rights in the matter, whatever they may be, cannot be adjudicated here.

Respecting the second proposition, it is apparent that the question of insurable interest on the part of John Strawn in the life of Roberts is not involved in the inquiry. It is true that the grandfather procured the making of the contract of insurance, but the policy was made payable to the grandson (the insured), and in case of his decease before maturity, to his executors, administrators, or assigns. So that in legal in-

tendment it was a contract wholly between the company and the insured. The courts below ⁴⁹³ held that the contract was not a wagering contract, and in this we agree with them.

The third proposition is of more gravity. It raises the question whether an insurance company in the making of a loan of its surplus funds can lawfully require of the borrower that a life policy be taken from that company and assigned to it as collateral security for the proposed loan. It would seem that the matter of the amount of the security otherwise tendered cannot have weight, for the parties are at full liberty to agree upon the amount of security to be taken, as they are to make any other contract not inhibited by law, and a contract otherwise legal is not to be invalidated because a court may be of opinion that more security has been exacted than was necessary. Had the policy been taken out in some other company, and assigned as collateral, no one would have thought of interposing the claim of usury. The objection must if well founded, upon some fact other than the quantum of security. Put in other words, the question is: May a loaner of money at the time of agreeing upon the loan also agree with the borrower for the execution between them of another contract, by which a part of the money loaned is to be paid to the lender as consideration for the lender's promise to pay a larger sum on a future contingency (a contract fair in itself and lawful), without tainting the loan transaction with usury? Authorities which seem to hold the negative of this proposition are adduced, and, regarded in the light of principle, the writer might have difficulty in reaching a satisfactory conclusion. But the question seems not to be an open one in this court. In the case of the same plaintiff in error against Morrow et al., reported in 16 Ohio Cir. Ct. Rep. 351, it is held by the circuit court that: "Where a life ⁴⁹³ insurance company requires of an applicant for a loan at the same time to take out an insurance policy on his life on the usual terms and conditions, such insurance and the premiums paid thereon will not be considered as compensation in addition to legal interest for the loan, and usurious." And a recovery was had. On error by Morrow to this court the judgment was affirmed: Morrow v. Union etc. Ins. Co., 61 Ohio St. 661, 57 N. E. 1133. It is suggested that in that case usury was not distinctly pleaded. Whether so or not, the facts were pleaded, and the record sufficiently disclosed facts warranting a holding against the company had the court been of opinion that

an insurance contract of the character indicated could not be made by the parties without tainting the loan with usury.

But it is insisted that the Morrow case is not authority in this case, because the insurance contract was different, in that in the Morrow case the insurance was effected on the life of the borrower himself, while here it was issued upon the life of another in whose life the borrower had no insurable interest. Assuming without holding that the borrower was without insurable interest in the life of the insured, does it follow that the contract of Strawn with respect to the payment of the premium notes was invalid? We confess our inability to see that it does. If the policy had been made payable to Strawn, the point would be well taken; but being payable to the insured, and not to Strawn, the rule as to insurable interest is not pertinent. If, then, the insurance contract and Strawn's notes for premiums are not invalid on that score, and if, as we have found, the requiring of a life policy by the company is not to be regarded as compensation in addition to legal interest for the loan, and so usurious, what is left here but an inquiry as ~~404~~ to consideration? Applying the familiar rule that one may lawfully contract with another for the benefit of a third, it would hardly be doubted that the grandfather might pay premiums on a life policy for the grandson and present him with the policy. Why not? If the purchase were a horse or a farm, would anyone doubt the legality of it? And if he might buy outright and pay, why might he not buy on credit? Could he, in a suit by the vendor of a horse so purchased or of a farm, be heard to say that he had no interest in the beneficiary and hence his obligation had no validity? The consideration moving from the company was its agreement to pay the policy at maturity, or at death if sooner; and the payment of the first five premiums by the grandfather for the benefit of the grandson constituted a sufficient consideration to support his pledge of the policy for the benefit of the grandfather, at least to the extent of premiums paid, and entirely good until he should elect to avoid the transaction.

Decisions are not lacking, and many are cited, to the effect that where the borrower is induced to make with the lender some unusual and unfair additional contract, as to buy a piece of land from the lender at an exorbitant price, or give a note to secure a loan of gold at a higher rate than the market value in addition to legal interest, the contract will be held usurious. But it does not appear that the insurance contract in this case

was unusual, or that the rate charged or the terms imposed were other than those which were customary.

It is further urged that the whole contract is unconscionable and its execution would result in great hardship. The former claim, we suppose, must stand on the question whether or not it is illegal. As to the ⁴⁰⁰ latter claim, it does appear to work a hardship as it has turned out. But had the young man died soon after the issuing of the policy, or during the time for which the premiums had been paid, the apparent hardship would have been on the other party. It was held by a fast bargain, and would have been compelled to pay, for no court would have listened to a defense by the company, had such been interposed, based on the ground here urged by defendants in error, viz., the inability of the minor to make a binding contract. In case of default by Strawn in the payment of his loan, the company would have been required to first exhaust the mortgage security, and only in the event that that proved insufficient could it have resorted to the proceeds of the policy. The balance would have belonged to the insured's legal representatives, subject possibly to advances on account of premiums. In this view the question of insurable interest on the part of the grandfather becomes immaterial, and the complaint of wagering contract untenable.

Viewing the case as presenting a legal claim on the part of the company, and following the former decision with respect to the main point of contention, we are led to the conclusion that the judgments below should be reversed, and the cause remanded to the court of common pleas, with direction to enter judgment upon its previous finding of facts and in conformity with this opinion.

Minshall, J., dissents.

AN INFANT'S CONTRACT OF INSURANCE is not void, but only voidable, at the election of the infant: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 615. Consult, also, *Johnson v. Northwestern etc. Ins. Co.*, 56 Minn. 365, 45 Am. St. Rep. 473, 57 N. W. 934, 59 N. W. 992.

LIFE INSURANCE.—One may insure his life for the benefit of a stranger: *Northwestern etc. Assn. v. Jones*, 154 Pa. St. 99, 35 Am. St. Rep. 810, 26 Atl. 253; *Union Fraternal League v. Walton*, 109 Ga. 1, 77 Am. St. Rep. 350, 34 S. E. 317; and a life insurance policy is assignable to anybody: *Wheeland v. Atwood*, 192 Pa. St. 237, 73 Am. St. Rep. 803, 43 Atl. 946.

CASES
IN THE
SUPREME COURT
OF
UTAH.

JACKSON v. CROWN POINT MINING COMPANY.

[21 Utah, 2, 50 Pac. 238.]

CORPORATIONS—ARTICLES OF INCORPORATION, AMENDMENT OF.—While a statute requiring the filing of original articles of incorporation with the secretary of state is mandatory, and applies equally to every amendment thereof which is fundamental, yet a failure to file an amendment which is not fundamental, such as an increase of the number of the board of directors, is not fatal, and forms no basis for a direct action by the state to forfeit the charter of the corporation.

CORPORATIONS—AMENDMENT OF ARTICLES.—A failure to file an amendment to the articles of incorporation of a corporation which is not fundamental, and which in no way changes the character of the corporation or the scope of its powers, but simply increases the number of its agents, who shall act as directors in carrying out the objects of its creation, does not invalidate the acts of such agents, which are within the corporate powers of the company, especially as to stockholders who may have participated in the meeting at which such amendment was made, without objecting thereto, and who voted to increase the number of directors.

CORPORATIONS—AMENDMENT OF ARTICLES—ESTOPPEL AGAINST THIRD PARTIES OR STOCKHOLDERS.—Any failure of a corporation to file amendments to its articles of incorporation or to otherwise comply with the provisions of a statute, which falls short of justifying proceedings on the part of the state to forfeit its charter, is not fundamental, and stockholders or third parties may, by their acts, be estopped from setting up such failure as a bar to the enforcement of their obligations to the corporation.

Brown & Henderson, for the appellant.

Dey & Street, for the respondent.

* BASKIN, J. The appeal in this case is from the final decree of the trial court, by which the appellant is perpetually

enjoined from selling the respondent's stock to pay an assessment levied thereon by the appellants' alleged board of directors.

¶ It is an undisputed fact, as found by the court below, that the said Crown Point Mining Company was duly incorporated on the sixteenth day of October, 1895, and is now and was at all times since said date a corporation organized and existing under the laws of the state of Utah. It also appears from the evidence that on the twenty-fifth day of May, 1898, a meeting of the stockholders of said company was held in pursuance of a notice thereof duly given; that the notice of said meeting specified that it was called for the purpose, among other things, of amending the articles of incorporation by increasing the number of directors from seven to nine, and of electing a board of directors in conformity therewith; that at said meeting the stockholders passed a resolution by which they resolved that the number of directors of said company, from the twenty-fifth day of May, 1898, should consist of nine stockholders, and thereupon proceeded to elect by ballot nine stockholders as directors; that the respondent, who was a stockholder, attended said meeting, and that while the testimony is conflicting as to whether he voted for said resolution, it does not appear that he voted against the same or made any objection thereto. In testifying in his own behalf, he admitted that he voted for nine directors, and that the ballot which he cast contained all the names of the nine directors chosen, except that of Pat Ryan, whose name he erased from said ballot and inserted his own instead. At said meeting three hundred and forty-three thousand shares were represented, among which were one thousand shares of the five hundred thousand shares, which constituted the capital stock of the company, represented and owned by the respondent. The nine directors chosen, on the second day of July, 1898, filed their bonds and oaths of office, and entered upon the duties of directors, and the business of the company has been transacted ^s by them since that date. Pat Ryan, one of the nine directors, was chosen by the board as president, and E. V. Duncan was chosen as secretary. The shares of respondent's stock, the sale of which was enjoined, were represented by certificates Nos. 146, 147, 148, signed by P. Ryan, president, and E. V. Duncan, secretary, and dated August 10, 1898, and on said day were delivered to respondent. At the time of such delivery respondent returned the certificates of the former owners of said stock, from whom

he had acquired the same, and accepted in lieu thereof the foregoing numbered certificates. Previous to that date, to wit, on the twenty-third day of July, 1898, at a meeting of said board of directors, at Chicago, Illinois, an assessment of three cents per share upon the capital stock of said company, by a resolution of the board, was levied, payable on the twelfth day of September, at the banking-house of W. S. McCornick & Co., Salt Lake City, Utah, and in said resolution it was stated that said stock should become delinquent for nonpayment on that day and be advertised for sale at public auction, unless paid before the twelfth day of October, 1898.

Upon the failure of the respondent to pay the assessment on his said stock a notice of the sale of the same, signed by E. V. Duncan, as secretary, was advertised in pursuance of said resolution, but before the date named in said notice for said sale the sale was enjoined.

Section 354 of the Revised Statutes of 1898 provides that "the full-paid capital stock of any corporation organized since March 8, 1894, or that may hereafter be organized under the laws of this state, shall not be assessable for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation; provided, that if such stock is made assessable and the manner of levying * the assessment is not provided for, it shall be levied in the manner and form hereinafter prescribed."

Section 8 of the articles of association of said company provides "that the amount of the capital stock of this corporation shall be one million dollars, divided into five hundred thousand shares of the par value of two dollars each, all of which stock is fully paid up and shall be assessable." Section 5 provides "that the board of directors shall consist of seven directors."

The amendment of section 5, which changed the number of the directors from seven to nine, was filed in the office of the county clerk, as required by section 339 of the Revised Statutes, on the twenty-fifth day of May, 1898, but was not, as required by said section, filed with the secretary of state until after the institution of this action, to wit, on the eighth day of October, 1898.

The foregoing facts are included in the findings of fact made by the trial court, except those which relate to the participation of respondent in the meeting of the stockholders on May 25, 1898, and his acceptance of the certificate signed by P.

Ryan, president, and E. V. Duncan, secretary and in regard to which there is no substantial conflict in the evidence.

In the ninth finding of fact the court found that the plaintiff (who is the respondent) at no time waived in any manner whatsoever the filing of said pretended amendment in the office of the secretary of state, and as conclusions of law found that the board of directors which levied said assessment was not a lawful board of directors of said company; that said pretended amendment did not become a part of the articles of incorporation of said company; that the said E. V. Duncan was not the lawful secretary of said company, and had no right or authority¹⁰ to act as such, with respect to said assessment or any proceedings had thereunder, and that said assessment, and all proceedings thereunder, were void.

One of the specific exceptions taken by appellant to the ninth finding, the conclusions of law and the decree, is that the evidence shows that the respondent is estopped from objecting to the validity of said assessment, on the ground that the board of directors, which he assisted in electing, and which levied said assessment, was not a valid one, on account of the failure to file the amendment of the articles in the office of the secretary of state until after said assessment was made.

As found by the trial court, at the time said amendment was made by the stockholders said company was, and had been since the sixteenth day of October, 1895, a corporation. As such corporation it had the authority to increase or diminish the number of its board of directors, within the limit contained in the proviso of subdivision 9, section 315, of the Revised Statutes, which is as follows, to wit: "In no case shall the number of directors be less than three nor more than twenty-five."

The amendment increasing the number of the directors from seven to nine did not alter the character of the corporation, or in the least add to or diminish the scope of its powers, and the increase, being within the limits of said proviso, was not violative of any state policy, and is not, therefore, fundamental.

In the case of *Mower v. Staples*, 32 Minn. 286, 20 N. W. 226, the court said: "Alterations which materially change the nature and purposes of the corporation, or of the enterprise for the prosecution of which it was created, are fundamental, while those which work no such material change are not fundamental. . . . The alteration proposed in the present case, by increasing the number¹¹ of directors from five to nine, is clearly not

fundamental, within the definition above given and sanctioned by the authorities cited. It in no way changes the nature or purpose of the boom company or of the enterprise for which it was created. It is a change respecting *modus operandi* merely; a change, not of the nature or purpose or character of the company, or of the company's enterprise, but a change of the instrumentalities and agency—the machinery—by which that purpose is to be effected and that enterprise carried on."

Many cases hold that the requirements in corporation statutes which are not fundamental are merely directory. In the case of *Mead v. Keeler*, 24 Barb. 24, the statute required the certificate of incorporation to contain the number of trustees and their names, and who should manage the concerns of the company for the first year. This the certificate failed to do, and the defendant resisted his liability as a stockholder on that ground. Mr. Justice Wells, in the opinion, said: "I think their corporate character may be legally upheld by treating the provisions of the act, which is the foundation of the objection, not as fundamental, but as directory."

In the case of *Stone v. Great Western Oil Co.*, 41 Ill. 85, the defendant resisted the payment of the amount of a call made on the capital stock of the company on the ground that the duplicate of the writing by which the association was constituted was not filed, as required by statute, in the office of the secretary of state, but the court held, and quoted numerous cases in support of the ruling, that the omission to file such duplicate writing did not exempt the defendant from liability to pay said calls, and that the requirement of the statute was directory only.

The same doctrine is held by the following cases: ¹² *Cross v. Pinckneyville Co.*, 17 Ill. 54; *Baker v. Backus*, 32 Ill. 79; *Spring Valley W. W. v. San Francisco*, 22 Cal. 440; *Mokelumne Hill Min. Co. v. Woodbury*, 14 Cal. 425, 73 Am. Dec. 658; *Humphreys v. Mooney*, 5 Colo. 283, 295; *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 75.

The provision of the statute requiring the filing of the original articles of the company is mandatory, because the character of the corporation and its powers were fixed by and depend upon the terms of said articles, and their filing and the issuance thereon of a certificate of incorporation by the secretary of state were indispensable steps in the formation of the corporation.

Any amendment which changes the character of the corporation, increases its powers, or is fundamental in other respects must be likewise filed as required by statute, but we fail to perceive any reason why the failure to file an amendment which is not fundamental, which in no way changes the character of the corporation or the scope of its power, but simply increases the number of the agents, who shall act as directors in carrying out the objects of its creation, should invalidate the acts of such agents, which are within the scope of the corporate powers of the company, especially as to the stockholders who may have participated in the meeting at which such amendment was made, without objecting to the same, and who voted to increase the number of the directors. The failure to file said amendment and the action of the company in pursuance thereof certainly are not grounds upon which a direct proceeding by the state to forfeit the charter of the company could be maintained. Any failure of a corporation which falls short of justifying such proceedings on the part of the state is not fundamental,¹³ and third parties may by their acts be estopped from setting up such failure as a bar to the enforcement of their obligations to the corporations.

In the case of *Bradford v. Frankfort etc. R. R. Co.*, 142 Ind. 383, 40 N. E. 741, 41 N. E. 819, at an annual meeting of the stockholders of said railroad company, the number of the directors was changed from thirteen to five. Bradford, in his complaint, alleged, as a ground for setting aside a consolidation of the defendant company with another company, that the reduction of the number of said directors from thirteen to five was illegal and void. The answer to the complaint alleged, among other things, the presence and active participancy in said annual meeting of plaintiff, and that he voted to change the number of directors, and voted for the five who were elected. A demurrer was interposed to the complaint, which was overruled. The appellate court, in an opinion sustaining the lower court, said: "Leaving out of view the rights of stockholders not present at the 21st of February meeting, and offering no intimation as to their rights, or as to the existence of an estoppel against them, we cannot avoid the conclusion that equity will not permit those who participated in the acts complained of to stand by, taking the chances of good or ill fortune from their acts, and then, when such acts have proven fruitless, to complain that such acts were irregular, or even fraudulent, and to seek relief therefrom."

In Matter of Application of Syracuse etc. R. R. Co., 91 N. Y. 1-5, the application to set aside an illegal election of a board of directors was denied, and one of the grounds stated in the opinion was that "the complaint ¹⁴ should be entertained only when made by some aggrieved party who is not himself the author of the wrong complained of."

The respondent attended the meeting of the stockholders of May 23, 1898, in pursuance of a notice which stated that the object of said meeting was to amend the articles of the company, by increasing the number of directors from seven to nine, and electing a board of directors in conformity therewith, yet he made no objection to the amendment, and cast his vote for the election of nine of the stockholders, including himself, as directors, and all of these persons excepting himself were unanimously chosen. By this action the respondent and the other stockholders tacitly agreed that said board should, as their representatives, transact the business of the company, and that their acts as such board, within the scope of the authority of the corporation, should not only be binding upon the stockholders, but also upon the company in its dealings with the public.

It is not claimed that said assessment was unnecessary, or that it was not made in good faith and to subserve the best interests of the company. From aught that appears from the record, it may have been made to pay creditors or meet some pressing emergency. Whatever may have been the purpose, in the absence of any showing or claim by respondent to the contrary, we must presume that it was for a legitimate purpose and to subserve the interests of the company. The respondent is clearly entitled to any of the benefits which may accrue to the stockholders under the management of the directors elected at said meeting, and in view of his tacit agreement in the premises he cannot in good conscience be permitted to shirk his obligations as a stockholder, on the ground of the ¹⁵ invalidity of the board of directors which he assisted in electing.

In none of the cases cited by counsel for the respondent upon this question does it appear that the party attacking the validity of the board had participated in the election or done any act in recognition of the validity thereof, and in none of these cases was the question of estoppel referred to, except in the case of *Moses v. Tompkins*, 84 Ala. 620, 4 South. 767, where it was incidentally mentioned in the following connection and language, to wit: "We are cognizant that some courts of the

highest authority have held that the power of persons to act in behalf of the corporation, who have become directors de facto, cannot be collaterally questioned by a stockholder, without a judgment of ouster against them in a direct proceeding for that purpose. An analysis of the cases would show, we think, that in a majority of them the election was not illegal and void, but irregular and voidable, because of ineligibility or other cause, or, if originally illegal that the shareholder assailing its validity had affirmatively acquiesced in their acts as directors."

In the case at bar, the respondent not only voted for the directors, but also acknowledged their rightful authority by returning the certificates of the stock transferred to him by former owners, and accepting in lieu thereof other certificates signed by the president and secretary elected by said board. So that the case of *Moses v. Tompkins*, 84 Ala. 620, 4 South. 767, instead of supporting the contention of the respondent, that the amendment is void on account of the failure to file said amendment, is a recognition of the principle of estoppel applied by us in this case.

It is not necessary to decide the other points raised by counsel.

¹⁶ It is ordered that the decree granting the perpetual injunction be set aside, and that the case be remanded with directions to the court below to render judgment in favor of the defendant, for its costs.

Bartch, C. J., and Miner, J., concur.

CORPORATION—FAILURE TO FILE ARTICLES.—A corporation that has failed to file its articles of incorporation with the county clerk of the county fixed by its articles as its principal place of business has no valid existence as a de jure corporation: *Capps v. Hastings Prospecting Co.*, 40 Neb. 470, 42 Am. St. Rep. 677, 58 N. W. 956. See, further, *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 179.

ON DEFECTIVE FORMATION OF CORPORATIONS in general, see the monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 176-186.

HOWELLS v. PACIFIC STATES SAVINGS, LOAN, AND BUILDING COMPANY.

[21 Utah, 45, 60 Pac. 1025.]

CONTRACTS—UNCONSCIONABLE.—A contract between a building and loan association and a borrower which requires the latter, on a loan of \$1,500, to pay \$18 monthly as premium on thirty shares of stock in the association, nominally subscribed for by the borrower until \$100 per share on such stock is paid, and to pay on such loan interest at the rate of six per cent per annum, payable monthly, until such stock is fully paid up to its par value of \$100 per share, and that upon such full payment such shares of stock shall be surrendered and the obligation become void, otherwise to remain in full force, is unconscionable, and the transaction should be treated as a simple loan, repayable with interest.

T. F. Howells applied to the Pacific States Savings, Loan, and Building Company for a loan of \$1,500, upon representations made by the company's agent that by subscribing for thirty shares of the company's stock and complying with other requirements, he could obtain the loan at six per cent per annum, and that the monthly installments that he would be required to pay on his stock subscription would pay off his indebtedness created by the loan in six and one-half or seven years. Howells, in his application for the loan, which was thereafter granted, stipulated as follows: "I hereby agree to hold thirty shares of stock in the Pacific States Savings, Loan, and Building Company, and to continue payments of installments on said stock until the same shall mature, or until the loan is otherwise repaid. I also agree to pay said company a bonus of fifty per cent of the stock above referred to as a consideration for the loan of \$1,500 applied for." Howells and wife executed and delivered to the loan company a bond in the sum of \$3,000, and also a mortgage on certain real estate as security for the payment of the loan. This action was brought to cancel such bond and mortgage. The answer admitted the execution of the bond and mortgage, the issuance of thirty shares of stock, and their conveyance by the respondent to the company, and the payments by him at different times of an amount greater than the principal loan and interest thereon at six per cent per annum, and set up a counterclaim based upon said loan, for \$689.95, with interest, and \$150 counsel fees, and prayed for the foreclosure of said mortgage, and that out of the proceeds of the sale of the real estate so mort-

gaged the said sums be paid. The trial court found that the transaction was unconscionable, and should not be enforced according to its terms, but that it should be treated as a simple loan, that the mortgage and bond had been fully paid and should be canceled, and that respondent should recover judgment for \$230. A decree was entered in accordance with said findings." The company appealed.

Booth, Lee & Ritchie and J. Croyland, for the appellant.

Pierce, Critchlow & Barrette, for the respondent.

⁵³ BASKIN, J. The appellant claims that the transaction in question is not a naked loan by one stranger to another, but in substance is a dealing in relation to partnership funds, in which the respondent and the other subscribers to the stock of the company have a common interest in the concern.

Among the by-laws of the company introduced in evidence are the following sections of article 2:

"Section 1. The shares of stock in this company shall be of four classes; namely, classes A, C, and D of ordinary installment shares, and class B of fully paid-up shares.

"Sec. 2. The shares of class A shall be payable in monthly installments of fifty-two (52) cents per share, and an expense fee of eight (8) cents per share, also payable monthly. The shares of stock class B shall be payable at their par value at the time of subscription therefor, together with the membership fee. The shares of stock class C shall be payable in monthly installments of sixty cents per share, and in class D in monthly installments of fifty cents per share. The first installment is due and payable on the second Tuesday of the month subsequent to the month in which the application is made; and all subsequent installments shall be due on the same day of the month.

"Sec. 3. On all advance payments on shares in classes A, C, and D for not less than six months, the members shall be entitled to receive a discount of five per cent per annum for the average time. On all shares of stock class B in this company members shall receive interest payable semi-annually. Such interest ⁵⁴ shall be fixed by the board of directors. They may also participate in such profits as the board of directors shall elect; but the interest paid shall be deducted from the profits, and the balance paid at the maturity of the series in which they are entered.

"Sec. 4. Whenever any share in classes A, C, and D shall have matured by monthly payments and profits credited to the full amount of one hundred dollars, the same may be withdrawn. Such shares not withdrawn thirty days after maturity shall thereafter be considered and entitled as class B shares, and members holding class A shares, after maturity will be required to surrender them to the company and receive therefor class B shares."

The certificate of the thirty shares of stock was never delivered to the respondent, but was, as recited in the bond, sold, assigned, transferred and set over to the company as security for the faithful performance of the bond. By the terms of the bond the respondent was required to continue to pay \$18 per month on the thirty shares of stock, together with the monthly interest on the amount borrowed, and all fines assessed, until said shares of stock became fully paid and of the par value of \$100, and that then, upon the surrender of said stock to the company, the bond was to become void. By the terms of the mortgage when said shares of stock became fully paid and of the par value of \$100 per share, then upon the delivery of said stock to the company in payment of the bond, which was for the sum of \$3,000, said mortgage was to become void. In other words, as stated in the deposition of William Pardy, the secretary of the company, when said stock became matured by such payments all the shares were to be surrendered to the company as premium and payment of the loan.

⁵⁵ The maturity of the thirty shares of stock by such payments would have closed the transaction and terminated the relations of the respondent to the company, and the payment of the loan with the interest thereon would have been the only benefit received by the respondent, or which he was entitled to receive under the provisions of the bond and mortgage.

Notwithstanding the thirty shares of stock were, in form, subscribed for and a certificate therefor issued in his name, it is evident that the respondent only became a nominal stockholder, and that his actual relation to the company was merely that of a borrower, and not that of a beneficial stockholder. The real beneficiaries of the company are the holders of class B stock.

There are no provisions, either in the bond or mortgage, which entitle the respondent in any form to share in any profits of the company; nor is he entitled, as provided in the fourth section of article 2 of the by-laws, upon the maturity and surren-

der of said shares, to receive in lieu of any of them, any class B shares, but, on the contrary, he is required to pay the full par value of said stock, and deliver the same to the company in satisfaction of the bond and mortgage, so that said stock, in disregard of the by-laws of the company, is subject to conditions essentially different from those to which any of the classes of stock mentioned in section 1 of article 2 of the by-laws is subject, and does not, therefore, belong to either of the classes of shares authorized in the by-laws.

Under the construction of the transaction contended for by appellant, the respondent thereby bound himself to pay on the thirty shares of stock \$3,000 in monthly installments of \$18, and to pay on the \$1,500 advanced \$7.50 interest each month until the monthly installments ⁵⁶ amounted to \$3,000. This would occur at the expiration of one hundred and sixty-six and one-third months. The monthly payments of interest up to that time would amount to \$1,250, so that in addition to the fines which may have been incurred, the respondent, in order to liquidate his indebtedness on the loan, according to such construction, would have to pay \$4,250, and in doing so the respondent would have paid at the end of six years, eleven and one-third months from the date of the transaction, in monthly installments of \$18, the \$1,500 loaned, and the monthly installments of interest thereon provided for, amounting to \$625, and in all to a sum of \$2,125. Yet notwithstanding this, under the construction contended for, he would have been obliged to still continue to pay the monthly installments of \$18, and interest on the sum loaned, until twice the sum of \$2,125 was paid. The whole thus required makes the amount of \$4,250, which sum is equivalent to the sum loaned (\$1,500) with interest thereon at the rate of twenty-six per cent per annum from the date of the transaction up to the expiration of the time, six years, eleven and one-third months, when the monthly payments required would have equaled the loan and the monthly interest which was to accrue during said period. Such a transaction is unconscionable.

Lord Hardwicke, in the celebrated case of *Chesterfield v. Janssen*, 2 Ves. Sr. 155, stated that fraud which is *dolus malus* "may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscientious bargains": 1 Story's Equity Jurisprudence, sec.

188. It is apparent from the facts disclosed by the record that the bargain in this case belongs to the class which Lord Hardwicke designated as unconscientious.

⁵⁷ It is evident that the transaction in regard to the thirty shares of stock was simply a cunning device to obscure the real transaction, and induce the respondent to believe that by subscribing for the stock he would derive a benefit other than the advancement of the sum loaned. Had the matter been presented in a direct and simple form, there can be little doubt but that the offered loan would have been declined.

In the case of *People's Building Assn. v. Fowble*, 17 Utah, 122, 53 Pac. 999, and *Sawtelle v. North American Sav. Co.*, 14 Utah, 443, 48 Pac. 211, this court held that a grantee, who purchases mortgaged premises and assumes and agrees to pay the indebtedness, upon a loan like the one involved in this case, secured by the mortgage, "has a right to have the stock payments, whether paid as dues or premiums, credited on the loan, and applied in reduction of the debt." In these cases the grantee in assuming the indebtedness of the borrower became obligated to make the same payments which the borrower would have been compelled to make in order to liquidate his indebtedness, had no conveyance of the mortgaged premises and assumption of the indebtedness been made. It follows that any payment which reduces such indebtedness in favor of such grantee must also reduce the same in favor of the borrower.

In view of the principles announced in these cases and cases cited therein, the peculiar facts disclosed by the record, and the unconscionable character of the stipulations of the bond and mortgage, the decree rendered is correct.

It is therefore ordered that the decree of the court below be affirmed with costs.

Bartch, C. J., and Miner, J., concur.

BUILDING AND LOAN ASSOCIATION.—USURIOUS and oppressive contracts of building and loan associations are considered in *Iowa Sav. etc. Assn. v. Heidt*, 107 Iowa, 297, 70 Am. St. Rep. 197, 77 N. W. 1050; and in the notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 200, 201; *Delano v. Wild*, 83 Am. Dec. 612-614.

Unconscionable Contracts.

Possibly the court in the principal case, had it thought proper to do so, might have been justified in declaring that the writings in question did not correctly represent the contract of the parties, and in reforming them so as to correctly express such intent. Its judgment, however, did not proceed upon this ground, but rather upon

the assumption that, as a court of equity, the trial court had the right to consider the reasonableness or justice of the contract, and to refuse to enforce it if, in its opinion, such contract was unconscionable. In support of this conclusion the language of Lord Chancellor Hardwick, in *Chesterfield v. Janssen*, 2 Ves. Sr. 125, 154, 1 Atk. 801, 854, is cited. We say his language is cited, for the decision in that case did not involve any determination of the question. It there appeared that John Spencer, then about thirty years of age and not in the best of health, borrowed five thousand pounds, and executed therefor a bond by which he agreed to pay ten thousand pounds if he should survive his grandmother, the Duchess of Marlborough, by whose death he would become entitled to a vast estate. A further bond was executed in the penalty of twenty thousand pounds, conditioned to pay the ten thousand pounds on the terms agreed upon. The duchess lived three years and six months. Soon after her death, Spencer executed another bond in the penalty of twenty thousand pounds, conditioned for the absolute payment of ten thousand pounds on or before the 1st of April following, and he also executed his warrant of attorney for confessing judgment, and judgment was thereupon entered. He subsequently paid two thousand pounds upon this judgment, and expressed himself satisfied with the transaction. He soon afterward died, and his executors sought to escape from the discharge of the obligation thus entered into by him upon the payment of the original sum of five thousand pounds, with interest from the time it was advanced. All the judges agreed that the transaction was not assailable, and that no relief should be given except as to the penalty of the last bond. In other words, the executors were required to pay the ten thousand pounds as agreed upon by their testator, though the consideration received was five thousand pounds only.

Where it is claimed that fraud has been practiced upon a person in procuring a contract from him, it is doubtless true that the character of the contract may be considered, and the fact that it is one that the court deems unconscionable may lead it to the conclusion, in connection with other evidence, that fraud was employed in obtaining it. In the principal case, however, there was no doubt that the defendant had loaned the plaintiff a sum of money, and that the plaintiff had agreed to repay it at a distant period. This agreement was an improvident one. The amount which the borrower would ultimately pay was greatly in excess of the sum borrowed with legal or other reasonable interest thereon, but no statute respecting usury was violated, and the case practically amounts to a holding that when money is lent, the courts may supervise the contract for repayment, and, if in their opinion unconscionable, may substitute some other contract in place thereof.

In *Schnell v. Neil*, 17 Ind. 29, 79 Am. Dec. 453, an agreement in consideration of one cent was made for the payment of six hundred dollars, and it was held that this was not a sufficient consid-

eration to support the promise; that while it was true, as a general rule, that inadequacy of consideration would vitiate an agreement, this doctrine did not apply to mere exchanges of money, whose value is exactly fixed. It is apparent, however, though the contract was also spoken of as an unconscionable one, that, considered as a whole, it appeared to be merely an agreement to make a gift in future, and that this was the real reason why the court refused to sustain it.

In *Sawyer v. McLouth*, 46 Barb. 350, the obligation sued upon was one by which Joseph Sawyer, promised to pay I. M. Sawyer, if living, and if not, then his son, Joseph Sawyer fifteen hundred dollars on the 1st of October, 1862. There was no evidence respecting the amount of money paid on the execution of the notes, but the defendant insisted that there was no consideration whatever, and that the object of the note was to make the payee equal to the other heirs of his father. The defendant asked the court to charge the jury that if there was consideration for the note by some money advanced to the maker, such money formed a consideration only as to the amount so advanced with interest, and beyond that sum the note was without consideration and invalid. The court refused to so charge, and the defendant excepted, and the trial court, in favor of the plaintiff, charged that if any moneys were advanced as a consideration for the note, though less than the amount thereof, it supported the entire note, and made it valid to the full amount of principal and interest. This latter instruction was said by the appellant to be erroneous, on the ground that "money, being the standard of value, is not subject to be changed by contract, and will support a promise to pay money only to the amount of the consideration," but the court nevertheless refused to reverse the judgment, because there was no evidence before the trial court to show any inadequacy in the consideration of the note, and whatever was said in respect to the instruction referring to the inadequacy of the consideration may, therefore, properly be regarded as a dictum. A dictum of similar purport may be found in *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573, which, like the case from Indiana, in fact involved only the validity of a contract to make a gift.

The general rule is that "mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation": *Earl v. Peck*, 64 N. Y. 509. See, also, *Batty v. Lloyd*, 1 Vern. 141; *Real Estate Inv. Co. v. Roop*, 132 Pa. St. 406, 19 Atl. 278; *Wormack v. Rogers*, 9 Ga. 60; *Judge v. Wilkins*, 19 Ala. 765; *Osgood v. Franklin*, 2 Johns. Ch. 23, 7 Am. Dec. 513.

Conceding that a consideration existed for the execution of an agreement for the payment of money at a future time, and that the parties thereto understood it, and that the maker was not incompetent and was not induced to act through any fraud or mistake, it seems difficult upon principle to maintain that the courts may interpose to the extent of declaring the contract unreasonable and its enforcement so unconscionable that no recovery will be allowed thereon at law, or that equity will interfere at the instance of the maker to set aside the contract or to enjoin its enforcement. The early English decisions sustain recoveries at law upon contracts, however foolish, on the part of the maker, as to pay for a horse a barleycorn a nail for every nail in his shoes, doubling every nail, though it appeared upon a computation that this amounted to five hundred quarters of barley: *James v. Morgan*, 1 Lev. 111; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164. Subsequent decisions, however, seem somewhat in harmony with that in the principal case. Thus, in *Floyer v. Edwards*, Cowp. 111, a recovery was refused upon an agreement to pay half a penny an ounce in case the price of gold wire sold was not paid in three months, and the refusal was placed upon the ground that the contract stipulated for a hard and unconscionable advantage. Where a loan was made of forty-five pounds, repayable on demand, and the lender stipulated for half the profits of a resale of the goods which the borrower intended to pay for from the money, and the lender two hours afterward put an agent in possession, and it appeared the profits were five pounds, it was held that the lender could not recover, first, because of usury, and second, because the action, being for money had and received, and hence founded upon conscience, he ought not to "recover such an unmeasurable and exorbitant demand." In several cases in Massachusetts its court also refused to permit a recovery according to the terms of the contract, on the ground that such contract was unconscionable, and required or permitted an assessment of damages upon some other basis, which the court regarded as less objectionable in point of conscience: *Cutler v. How*, 8 Mass. 257; *Cutler v. Johnson*, 8 Mass. 266; *Baxter v. Wales*, 12 Mass. 365. An examination of these cases will, however, we think, show that the course adopted by the court was rather for the purpose of relieving the transaction from the taint of usury than of undertaking to supervise contracts for the purpose of determining whether they were reasonable. There are several cases in which the real transaction between the parties was a borrowing and lending of money, and in which the lender stipulated for an unreasonable collateral agreement, as that the borrower would purchase other property and pay a sum grossly in excess of its value, and these contracts have been held to be unconscionable and for that reason not enforceable: *Hough v. Hunt*, 2 Ohio, 501, 15 Am. Dec. 566; *Cockell v. Taylor*, 15 Beav. 103; *Butler v. Duncan*, 47 Mich. 94, 41 Am. Rep. 711, 10 N. W. 123. There are several comparatively recent English cases

wherein agreements made by borrowers of money to pay sums greatly in excess of those borrowed have been held to be enforceable only for the amounts actually received, with interest: *Miller v. Cook*, L. R. 10 Eq. Cas. 641; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484; *Beynon v. Cook*, L. R. 10 Ch. App. 389; *In re Slater's Trust*, L. R. 11 Ch. Div. 227; *Croft v. Graham*, 2 De Gex, J. & S. 155.

A woman and her husband assigned a policy of insurance on the latter's life, the assignee paying an adequate consideration therefor, and also discharging the premiums which subsequently accrued until the maturity of the policy. When the assignee sought to collect the insurance, the insurers refused payment unless the wife's name should be signed on the back of the policy, and she refused to sign unless she should be paid the sum of four hundred and seventy-seven dollars when the policy should be collected. The assignee thereupon executed a writing agreeing to pay the sum thus demanded, and she signed her name on the policy, and the assignee received payment thereof. When she brought an action to recover upon this agreement, it was held that it could not be enforced beyond such amount as was fairly due for her inconvenience and service in writing her name. It seemed to be conceded that she was under no obligation to sign the policy, as required by the insurer, and that, on the other hand, full payment had been made for the original assignment. "Morally," said the court, "Mrs. C. ought to have given it, without making the extortionate demand she did. Instead of acting justly, she attempted to take advantage, and an unfair one, of the plaintiffs in error, who had bought and paid for all her right and interest in the policy. She thought herself in a condition to exact an unconscionable bargain, and for service worth only a few cents she demanded and received a written promise for the payment of nearly five hundred dollars. The mind revolts at the enforcement of such a promise, and as the courts, as a rule, seize upon the slightest act of oppression or advantage to set at naught a promise thus obtained, we are of the opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that she cannot recover on the agreement": *Kelley v. Caplice*, 23 Kan. 474, 33 Am. Rep. 179.

In one case, the supreme court of the United States said: "If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to"; *Scott v. United States*, 12 Wall. 445. The question, however, was not there involved, and this expression is a pure dictum. It is quoted in the subsequent case of *Hume v. United States*, 132 U. S. 412, 10 Sup. Ct. Rep. 134, where, however, the court, after citing several authorities, undertook to harmonize them by showing that their apparent conflict was due to the different forms of action resorted to, saying: "As to many of the cases, it may be objected that they are at variance with the rule that a party

must recover according to his contract, if he sue upon it, or not at all, although, if the express contract were void, the defendant might nevertheless be held in general assumpsit, upon the implied contract to pay for property received from the plaintiff and retained. The true principle deducible from the authorities, and most consistent with the reason of the thing, seems to be this: In the instance of a special contract which has been wholly executed and the time of payment passed, if the plaintiff proceeds in general assumpsit, the express contract is only evidence of the value of the consideration, which is open to attack by the defendant in reduction of damages. But where the action is in special assumpsit, the express promise of the defendant fixes the measure of damages to which the plaintiff is entitled. And while the general rule is that the performance of every contract may be resisted on the ground of fraud, at law as well as in equity, yet upon a contract of sale, the defendant, having accepted performance, cannot interpose this defense to defeat the contract, unless he returns the article or proves it to have been entirely worthless, though he may ordinarily recoup the damages which he can show he has sustained through the fraud. And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the nonreturn of articles furnished, and these have some value, the amount sued for may be reduced to that value." The contract here in question was one by which the United States agreed to pay sixty cents per pound for shucks at a time when the market price of that article did not exceed one and three-fourths cents per pound. It was claimed on the part of the government that the amount agreed to be paid had resulted from an error in the schedule, and that this error had not been discovered until after the shucks had been received and used. The contractor, on the other hand, insisted that the price specified in the contract "was the price at which he intended to bid, and that there was no mistake on his part in making out the bid." The court said: "This is an admission that he designed to commit the agents of the government to a contract 'such as no man in his senses and not under illusion would make, on the one hand, and as no honest and fair man would accept, on the other,' and is fatal to a recovery according to the letter of the contract."

Where it is necessary for the payee to resort to equity for the enforcement of his contract, as where it is secured by a mortgage, there seems to be little doubt that the court will look into the circumstances under which the contract was executed, and if it appears to have been obtained through advantage taken of the maker,

or to his being then in specially embarrassing circumstances, the contract will not be enforced except to the extent of the consideration actually received. This rule was applied where, in consideration of the cancellation of a note of two hundred and seventy dollars, another note was obtained for three thousand dollars, secured by a deed intended to operate as a mortgage. The court said: "The plaintiff comes into a court of equity and asks the enforcement of this new contract by a foreclosure of the absolute deed as a mortgage, and a sale of the property to satisfy the note. It is too evident, from the conceded facts in this case, that the defendant had been induced to enter into the contract sued on under such circumstances as ought, in equity, to discharge him from performance. The testimony does not give a full or satisfactory account of the motives, surroundings, or influences which immediately prompted the consummation of the new contract, but enough appears to justify a court of equity in withholding its active interposition for the enforcement of the contract": *Richardson v. Barrick*, 16 Iowa, 412.

From a due consideration of the dicta and the actual decisions upon the subject, we think the following conclusions may be regarded as fairly well established: 1. If a definite sum of money is loaned by one person to another, who in consideration thereof agrees at a fixed time in the future to pay a greater sum, with interest, and perhaps when no interest is stipulated for, but the sum to be paid is grossly disproportionate to that received, the agreement will be deemed without consideration and unconscionable, in so far as it calls for a sum greater than that loaned, with interest; 2. That in all cases where a payee resorts to equity, or to an action at law based on conscience, and therefore subject to the rules of equity, courts may inquire respecting the consideration of the agreement, and refuse to enforce it, if found unconscionable; 3. That though the action is at law, and founded upon an express promise, the consideration may be so inadequate when considered in connection with the thing promised to be done, or the money agreed to be paid, that courts will conclusively presume that the agreement was founded upon fraud, oppression, or undue influence, and hence must not be enforced beyond the consideration received with interest.

SMITH v. SCHWARTZ.

[21 Utah, 126, 60 Pac. 305.]

JUDGMENT LIEN—EXTENSION OF BY COURTS.—The duration of judgment liens is dependent upon the express will of the legislature. The courts have no power to extend them, nor have they the right, when the language employed by the legislature is unambiguous, by construction, to make exceptions or qualifications to meet the hardship of particular cases. To do so is a usurpation of legislative power.

JUDGMENT LIENS—EFFECT OF LEVY OF EXECUTION. The levy of an execution upon real estate, during the time that the judgment upon which the execution issued was a lien, neither extends the lien, nor does it create a new lien upon the property.

JUDGMENTS—LIEN OF—WHEN MORTGAGE LIEN TAKES PRIORITY.—If a justice's judgment becomes a lien upon land by being duly docketed, but before its enforcement by levy and sale, a mortgage lien against the same land accrues, and thereafter the time limited by statute for the lien of the judgment expires, and the judgment is renewed, the mortgage lien attaches as a first lien, and a sale under the renewed judgment does not affect the mortgage lien.

E. Lewis, for the appellant.

A. T. Schroeder and C. F. and F. C. Loofbourow, for the respondents.

¹²⁰ **BASKIN, J.** It is alleged in the complaint that the plaintiff, who is the appellant, is the owner in fee and in the actual possession of the following real estate situate in the county of Salt Lake, state of Utah, to wit, the south west quarter of the southwest quarter of section 29, in township 2 south, of range 1 east, of Salt Lake meridian, and that defendants claim an estate therein adverse to plaintiff, which is wrongful and without right.

Upon the complaint the plaintiff prays that her title, by a decree of the court, may be quieted. The answer denies the alleged title and possession of plaintiff; alleges that the defendant, Leo Alexander, is the owner in fee simple of said real estate, and sets out in full detail how his said title was derived; also sets out other matters of defense which it is not necessary to specially mention. The prayer of the answer is "that the plaintiff take ¹³⁰ nothing by her complaint; that her said complaint be dismissed; that the title of the defendant Alexander herein set up be quieted and confirmed as against any and all claims of the plaintiff."

There is no dispute between the parties regarding the facts on which the alleged titles of the respective parties are predi-

cated, and as found by the court and disclosed by the evidence they are as follows: "That at and prior to February 19, 1892, the lands in question were held in fee simple by one Robert Gardiner; that on the eighteenth day of February, 1892, there was duly rendered a judgment in favor of the said M. Schwartz, respondent, and against the said Robert Gardiner, in the sum of two hundred and eleven dollars and eighty-five cents in an action pending before H. E. Booth, a United States commissioner and ex officio justice of the peace in and for the territory of Utah; that afterward, to wit, on the nineteenth day of February, 1892, the said defendant Schwartz caused an abstract of said judgment to be filed in the office of the clerk of the district court of the third judicial district of Utah, county of Salt Lake, that being the county in which the aforesaid premises are situated; and by virtue thereof it became a lien upon said property, there being at that time no other liens thereon; that on November 29, 1895, the defendant Schwartz caused an execution to be issued on said judgment and to be placed in the hands of the sheriff of Salt Lake county, Utah, and a levy to be made on said real estate, December 5, 1895, and the same was advertised to be sold under said levy, on the thirtieth day of December, 1895; that on the twenty-eighth day of December, 1895, a restraining order was issued by said district court in a suit by appellant against the said Schwartz and the sheriff, enjoining the sale of said real estate under said levy, which remained in full force until the eighth day of May, ¹⁸⁹⁷ 1897, at which date it was dissolved, and the action was dismissed; that the execution upon which the levy was made was returned by the sheriff on account of said restraining order unsatisfied."

That on the twenty-third day of April, 1897, the judgment in favor of Schwartz against the said Gardiner was renewed by a judgment of the district court in and for the third judicial district, county of Salt Lake, in an action instituted in said court for that purpose by the said Schwartz against the said Robert Gardiner, but it does not appear that the appellant, Nellie S. B. Smith, was a party to said action; that upon this renewed judgment, and after the dissolution of the restraining order, to wit, on the fourth day of May, 1897, another execution was issued to the sheriff of Salt Lake county, and by him levied upon said real estate, which was by him advertised for sale, and on the twenty-fourth day of June, 1897, was sold at public auction to the said Schwartz, he being the highest and best bidder therefor, and a certificate of purchase in due form

was issued to him, and a duplicate copy thereof duly filed with the county recorder; that after the time for redemption from said sale had expired, and no redemption having been made, to wit, on the third day of January, 1898, the sheriff of said county duly executed and delivered to the said Schwartz a deed conveying to him said real estate, which deed was duly recorded on said day in the office of the recorder of said county; that on March 3, 1898, the said Schwartz, by a deed of warranty, conveyed said real estate to his correspondent, the said Leo Alexander, in fee simple.

The respondent, Leo Alexander, claims title under the foregoing facts, and the appellant's claim of title rests upon the following facts, to wit, more than ten months after the judgment of Schwartz against Gardiner was ¹³² obtained, and an abstract of the same was filed in said district court, the said Gardiner and his wife conveyed said real estate in fee simple to Eugene Lewis, trustee, with Cyrus B. Hawley as his successor in trust, to secure the payment of a promissory note executed by the grantors to the appellant, Nellie S. B. Smith, for six hundred and fifty dollars. The trust deed contained the proviso that in case of default in the payment of said note, said trustee, or his successor in trust, might sell said real estate for the purpose of paying the same, with interest; that said deed was duly recorded in the recorder's office of Salt Lake county on December 31, 1892; that appellant paid the taxes on said premises in 1894, 1895, and 1896; that her agent rented the premises in 1897 and 1898 to one Henry Monterr for pasturage; that the premises consisted of a tract of wild land surrounded by a wire fence; that during the lease the lessee was seen by a neighbor putting in and taking therefrom a number of cattle; that default having been made in the payment of said promissory note, and the said trustee, Eugene Lewis, having refused to act as such, his successor, Cyrus B. Hawley, at the request of appellant, proceeded to advertise and sell said real estate, under the authority of said trust deed to the appellant, and upon such sale by deed duly executed, delivered, and conveyed on August 13, 1894, in fee simple to the appellant said real estate.

At the trial of this case the court found as a conclusion of law from the foregoing facts that "all of the rights of the plaintiff under and by virtue of said trust deed have been foreclosed and lost; that the said defendant, Leo Alexander, is entitled to

a decree quieting the title to the above property as against the plaintiff," and rendered a decree in accordance therewith.

The only question which it is necessary to decide is ¹³³ whether the facts justify this conclusion of the trial court and the decree rendered thereon.

It is provided in section 3605 of the Compiled Laws of 1888 that when an abstract of a judgment of a justice of the peace is filed and docketed in the office of the clerk of the judicial district in which such judgment is rendered, as required by section 3603, "such judgment is a lien upon the real property of the judgment debtor, not exempt from execution, situated in that judicial district, for the period of five years from the date of the judgment, unless the judgment be previously satisfied."

It is admitted by counsel for appellant that by filing the abstract of the judgment rendered by the justice of the peace in favor of Schwartz against Gardiner, the former acquired a lien on the real estate in question, and that the lien afterward acquired by the appellant, under her mortgage was subject to the prior lien of Schwartz, but claims that at the expiration of five years from the date of said judgment, and by the revival of said judgment the prior lien of Schwartz was extinguished, and thereafter ceased to be an encumbrance upon said real estate as against the appellant.

In reply to this the respondent claims that as the appellant wrongfully procured a restraining order staying the enforcement of the prior lien, that the period of such stay does not constitute any portion of the limitation of the statute, and that the respondent was entitled to five years, exclusive of that period, in which to enforce his lien. Among the cases cited by respondent's counsel in support of the contention on this question are *Dewey v. Latson*, 6 Cal. 131; *Englund v. Lewis*, 25 Cal. 339; *Barroilhet v. Hathaway*, 31 Cal. 396, 89 Am. Dec. 193.

The two hundred and fourth section of the California code before its ¹³⁴ amendment provided that from the time of docketing a judgment it shall be a lien on the real estate of the judgment debtor for two years.

In the case of *Dewey v. Latson*, 6 Cal. 131, an appeal was taken from the judgment, and the single question presented was whether in such cases the statute commences to run from the docketing of the judgment in the court below, or from the date of the remittitur from the appellate court. The court

held that the statute commenced to run only from the latter date.

In *Englund v. Lewis*, 25 Cal. 339, the court held that "when an appeal has been taken, and a bond sufficient to stay proceedings upon the final judgment pending the appeal has been given, the lien of the judgment upon the real estate of the judgment debtor in the county where the same was docketed, owned by him at the date of the docketing of the judgment, or subsequently acquired, until the lien expires, remains a valid and subsisting lien until the end of two years from and after the date of the remittitur from the supreme court," but did so on the ground of *stare decisis*, and declined to pass upon the merits of the question in the following language: "Without, therefore, discussing the merits of the question, we rest our decision solely upon the doctrine of *stare decisis*, holding the present to be a case to which that doctrine ought to be applied."

In the case of *Solomon v. Maguire*, 29 Cal. 237, the court in its opinion said: "It is sufficient to say that the case of *Dewey v. Latson*, 6 Cal. 134, is of very doubtful logic. It is true that we followed the rule in that case in *Englund v. Lewis*, 25 Cal. 352, but we did so solely upon the doctrine of *stare decisis*; and we are not disposed to extend the doctrine of that case beyond the precise question there determined."

¹³⁵ In the case of *Barroilhet v. Hathaway*, 31 Cal. 396, 89 Am. Dec. 193, it was held that "if any time is allowed to elapse between the docketing of the judgment and stay of proceedings such time must be included in the computation of the time during which the judgment remains a lien; but the time during which proceedings are stayed by order of the court must be excluded."

This decision was rendered in 1866. In 1870 the legislature of Utah enacted the Code of Civil Procedure, which, with slight alterations, was a literal transcript of the California code. Section 207 of the Utah code (Sess. Laws 1870, p. 54) is as follows: "A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing of the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county owned by him at the rendition of the judgment in his own right. The lien shall continue for two years, unless the judgment be previously satisfied. But the time during which the execution of the judgment is suspended

by appeal, or action of the court or defendant, shall not be computed."

The provisions of the last sentence of said section were not contained in section 204 of the California code. They are, however, in harmony with the construction placed upon the latter section in the case of *Barroilhet v. Hathaway*, 31 Cal. 396, 89 Am. Dec. 193, and are broad enough to include the time during which an execution is suspended by injunction. Said provisions were probably added with the view of conforming to said decision.

Section 555 of the Utah code of 1870 provides that a judgment of a justice of the peace, when a transcript thereof is filed with the county recorder, shall constitute a lien on the land of the judgment debtor in the county ¹³⁶ where filed the same as if said judgment had been rendered by the probate court. At that time section 29 of the act of the territorial legislature, relating to the judiciary which provides that the several probate courts should have "original jurisdiction, both civil and criminal, and as well in chancery as at common law (Sess. Laws 1855, p. 31)," had not been repealed, and said courts were exercising such jurisdiction. So that the provisions added to section 204 of the California code, before referred to, applied to the judgment liens mentioned in section 555 of the code of 1870. If there had been no further legislation on the subject, there could be no doubt regarding the correctness of respondent's position.

In the case of *Rogers v. Druffel*, 46 Cal. 654, the question under consideration was presented upon facts substantially the same as in the case at bar. The facts stated in the opinion of that case are as follows: "Action to quiet title to a lot in the city of San Francisco. Both parties claim this under John C. Gimmy. The plaintiff's deraignment of a title is as follows: In an action for divorce brought by Anna M. Gimmy against John G. Gimmy a judgment was entered April 1, 1861, in favor of Anna against John G. Gimmy, for a divorce and for a recovery of one hundred dollars, counsel fees, and her costs, taxed at four hundred and twenty-two dollars, and the judgment was duly docketed. In May, 1861, an execution was issued on that judgment, and under it the sheriff sold the property, and in pursuance thereof, in April, 1862, executed the deed of conveyance, under which the plaintiff claims title.

"The defendant's deraignment of title is as follows: Maria B. Gimmy recovered a judgment for five thousand dollars

against John G. Gimmy, February 1, 1860, and it was docketed upon that day. On the 4th of March, 1861,¹³⁷ an execution was issued on the judgment, and on that day the sheriff levied upon the premises in controversy. In an action commenced by Anna M. Gimmy against Maria B. Gimmy and the sheriff a temporary order of injunction was issued in March, 1861, restraining the sale under the last-mentioned execution, and in November, 1862, the injunction was dissolved. In June, 1863, on motion of Maria B. Gimmy, the district court ordered an alias execution to issue, and it was accordingly issued, and under it the sheriff sold the premises in July, 1863, and in pursuance of such sale the sheriff executed a deed of the premises to the defendant in April, 1864. It thus appears that the defendant's judgment lien first attached; that his execution was levied, but his sale was not made within two years from the docketing of the judgment, unless the time during which the sale was restrained by injunction be deducted."

In passing upon these facts, the court said: "It was held in *Barroilhet v. Hathaway*, 31 Cal. 397, 89 Am. Dec. 193, that 'the two years mentioned in the two hundred and fourth section of the practice act, which relates to judgment liens, commences to run from the docketing of the judgment, unless execution is stayed by order of the court pending a motion for a new trial or by an appeal with a stay bond.' In view of that construction of the statute, we hold that the order of injunction mentioned in this case did not stop the running of the statute": See, also, *Christy v. Flanagan*, 87 Mo. 671; *Swift v. Conboy*, 12 Iowa, 444.

The case of *Rogers v. Druffel*, 46 Cal. 654, was decided in 1873, and in 1874 section 204 of the California code was amended by section 671 of Deering's code, by adding the clause hereinafter quoted from section 3414 of the Compiled Laws of Utah of 1888.

¹³⁸ The Utah code of 1870 was revised in 1888, and in this revision the provisions contained in the last sentence of section 207 of the code of 1870 were eliminated, and the following substituted in place thereof (Comp. Laws 1888, sec. 3414): "The lien shall continue for five years, unless the judgment be previously satisfied, or unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment ceases." And section 555 of the code of 1870 was changed so as to limit the lien of a judgment rendered by

a justice of the peace to the period of five years from the date of the judgment: Comp. Laws 1888, sec. 3605. In section 3417 of said laws another class of judgment liens is limited in a like manner. These revised sections were re-enacted by the adoption of the Revised Statutes of 1898.

In view of this legislation it is clear that the provision of section 207 of the code of 1870, before referred to, was eliminated in the revision of 1888 for the purpose of limiting the period of judgment liens, absolutely and without exceptions, to five years from the date of the filing of the abstract required by the code.

The duration of judgment liens is dependent upon the express will of the legislature, and the courts have no power to extend them. Nor have they the right when the language employed by the legislature is unambiguous, by construction, to make exceptions or qualifications to meet the hardship of particular cases. To do so would be a usurpation of legislative power.

In the case at bar the execution under which said real estate was sold to Schwartz was levied on said real estate more than five years after the abstract of the judgment ¹⁸⁹ rendered by the justice of the peace in favor of Schwartz was filed in the office of the clerk of the district court. At the later date the judgment, by virtue of the statute, became a lien on the real estate, and by virtue of the statute it expired five years from that date.

Respondent's counsel, however, further contend that the levy, on December 5, 1895, of the execution issued on the Schwartz judgment created a lien on said real estate which was independent of and supplementary to the judgment, and which continued after the expiration of the judgment lien and until the day of sale on the twenty-fourth day of June, 1897. Two liens at the same time, on the same thing, for the same sum, due on the same cause of action, would be a strange anomaly.

It is well settled by the authorities that "the levy of an execution upon real estate, during the time that the judgment upon which the execution issued was a lien upon the same, neither extends the lien of the judgment, nor does it create a new lien upon the property": *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, 24 Pac. 852; *Eby v. Foster*, 61 Cal. 287; *Tenney v. Hemenway*, 53 Ill. 98; *Gridley v. Watson*, 53 Ill. 186; *Cornwell v. Watkins*, 71 Ill. 488; *Pierce v. Fuller*, 36 Hun, 179; *Roe v.*

Swart, 5 Cow. 294; Tufts v. Tufts, 8 Wend. 621; 1 Freeman on Judgments, sec. 383; 1 Freeman on Executions, sec. 205, and note; Davis v. Ehrman, 20 Pa. St. 258.

The sale of said real estate was not made to Schwartz on the levy made December 5, 1895, of the execution issued on the judgment in his favor by the justice of the peace, but under an execution issued upon another judgment of the district court which was not rendered until the expiration of more than five years from the date of filing the abstract of the judgment of the justice of the peace. ¹⁴⁰ The judgment of the district court was for a different sum than the former judgment. It included the costs of the suit in the district court, also the interest on the former judgment from its rendition up to the date of the second judgment, and as this judgment drew interest from its rendition up to the date of the sale to Schwartz, compound interest accumulated, as also interest on the amount of said costs. Neither said costs nor compound interest were covered by said lien. Therefore, the first judgment was different from the second in its material elements, and being different, and the appellant not being a party to the action in which it was rendered, the rights of the appellant were in no wise affected thereby.

In Woolston v. Gale, 9 N. J. L. 32, the chief justice in the opinion said: "It has more than once been determined that on scire facias the justice is to render judgment that execution issue and for costs, and cannot render a new judgment for the amount of the original judgment and interest and costs thereon."

"If after judgment and levy on lands, the judgment debtor executes a mortgage, and the judgment becomes dormant, the revival of the judgment does not operate to the prejudice of the mortgage lien; but in such case the mortgage lien becomes perfect, and the judgment lien on the mortgaged premises is lost": Tracy v. Tracy, 5 McLean, 456, Fed. Cas. No. 14,128; Norton v. Beaver, 5 Ohio, 178; Miner v. Wallace, 10 Ohio, 404; Denegre v. Haun, 13 Iowa, 240, 244; Freeman on Executions, sec. 205, and note 1; Freeman on Judgments, secs. 383, 388, 394.

"A judgment lien on land constitutes no property or right in the land itself. It confers only a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment, . . . and subject to ¹⁴¹ this right the defendant may convey the land": Freeman on Judgments, sec. 338.

The conveyance to the appellant as purchaser at the sale of said real estate, under her trust deed, passed to her the title subject to the prior lien of the judgment rendered by the justice of the peace; and when by operation of law this lien was extinguished, it ceased to be an encumbrance, and the title of the appellant thereupon became absolute; and as at the date of the rendition of the judgment by the district court, and at the time the execution was issued thereon and the sale thereunder made, the said Gardiner had no title to the premises, and no lien thereon existed, the sheriff's deed to the purchaser at said sale passed no title to the premises. Therefore, the respondents' claim of title under the deed from said purchaser is without foundation and constitutes a cloud upon appellant's title, which she is entitled to have removed, and is not estopped from maintaining this action.

It is ordered that the decree of the court below be set aside, and the case remanded with directions to enter a decree quieting the title of appellant as prayed for in her complaint, and that the respondents pay the costs.

Miner, J., concurs.

Bartch, C. J., dissents.

A JUDGMENT LIEN CANNOT BE PROLONGED by a court of equity beyond the period fixed by statute, though the suit is commenced and at issue within such period, but is not reached for trial until the expiration thereof: *Ruth v. Wells*, 13 S. Dak. 482, 79 Am. St. Rep. 902, 83 N. W. 568. If the limitation of action on a judgment is seven years, the right of action upon it is barred after the lapse of that period, notwithstanding the issuance of an execution before the expiration of that time: *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539, 18 South. 934. The levy of an execution upon real estate during the pendency of a judgment lien neither extends such lien nor creates a new lien: *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

JUDGMENT, RENEWAL OF—MORTGAGE.—A sale of land under a judgment renewed after its active energy has expired divests the lien of a mortgage executed during the active energy of the judgment: *Verner v. Brookman*, 58 S. C. 308, 69 Am. St. Rep. 870, 81 S. E. 233. Compare *Mower v. Kip*, 6 Paige, 88, 29 Am. Dec. 748.

BUNKER v. COONS.

[21 Utah, 164, 60 Pac. 549.]

HOMESTEADS—EXECUTION SALE OF—SETTING ASIDE. If the execution defendant is the head of a family, and provides for the support of his aged mother from the proceeds of land sold under execution and from his own labor, and such land has been selected and used as a homestead for the support of his family, and notice has been served upon the sheriff, before the sale, that the land is claimed as a homestead, and a declaration of homestead has been duly filed, such execution sale must be set aside, especially if such land is all that the homestead claimant owns and its value does not exceed the statutory limit.

HOMESTEADS—ABANDONMENT.—The temporary absence of a homestead claimant from his residence for a year or two at one time, when attending to his business out of the state, in order to earn money with which to assist in providing for his family, coupled with a bona fide intention to return to, and to reside and build a house upon, the land, and the fact that he visits at his home during such absence does not constitute an abandonment of the homestead right.

HOMESTEADS—NECESSITY OF DWELLING UPON LAND.—The fact that there is no dwelling-house upon the land claimed as a homestead, and that the claimant's mother resides with him one-half mile therefrom, does not deprive him of his homestead right, if it appears that the products of the land are used for the support of the family, and its value is within the homestead limit.

HOMESTEADS—HEAD OF FAMILY.—A man with whom his mother resides, and by whom she is cared for and maintained is the head of a family, and his actual residence upon the land claimed as a homestead is not necessary to render it exempt from execution.

HOMESTEADS—HEAD OF FAMILY—RESIDENCE.—A head of a family resides on the homestead when he has the care and maintenance of a family who reside on or near the homestead, or some part of it, and who derive their support, in whole or in part, from the products of such land used or intended, in good faith, as a homestead.

HOMESTEADS—WAIVER IN ADVANCE.—A homestead right, when vested in the head of a family, cannot be waived by contract in advance of the assertion of the homestead right. Such a contract or waiver is against public policy.

W. F. Knox and C. W. Collins, for the appellants.

V. Rapp, for the respondent.

107 MINER, J. The plaintiff Bunker since 1890 was the owner of thirty acres of improved land without buildings thereon located at Annabella, Sevier county, of a value of less than one thousand dollars. The defendant the Consolidated Improvement Company obtained judgment against the plaintiff upon a promissory note given in payment for a wagon in Janu-

ary, 1895, and an execution issued thereon, which said execution was placed in the hands of the defendant Coons, who levied the same on the land and sold said land to the defendant the implement company in July, 1898. This action was brought to set aside the sale on execution on the grounds that the plaintiff at the time of the levy and sale was the head of a family, with whom he resided in the vicinity of the land, and that the proceeds thereof were and had been used for the support of himself and family; that the land constituted his homestead, and was exempt from levy and sale on execution; that he intended to build upon said land when able, and use the same as a homestead for himself and family; that this family consisted of himself and aged mother, who was dependent upon him for support. ¹⁶⁸ Upon a trial of the case before the court without a jury the court found all the issues in favor of the plaintiff, and ordered the sale set aside. The defendants appeal.

The appellants contend that the evidence was not sufficient to justify the findings, because: 1. The plaintiff did not actually live upon the land; 2. That plaintiff was not the head of a family; 3. That plaintiff's mother was not dependent upon him for support; 4. That plaintiff was not a resident of Utah; 5. That plaintiff waived his homestead right by a clause in the note providing that he waived all right to exempt property by virtue of the homestead exemption laws, and that the court erred in refusing to admit such waiver contained in the note in evidence.

Plaintiff testified, in substance, that he resided at Annabella, Sevier county, Utah, and had for many years; that for about ten years prior to the levying of the execution he had hired from his brother a house about a half mile from the land in question for a home for himself and mother, and that they had resided there to the time of the sale; that he lived there and supported his mother, and that she was dependent upon him for support; that he had paid the rent of the house; that he had rented the land in question on shares, and all the proceeds of the farm, consisting of lucern, oats, etc., were carried to his residence aforesaid for his mother's use during those years; that the lucern and grain raised was fed to cows and used up in her support; that the farm in question was worth less than one thousand dollars, and that it was all the real estate he owned; that a few years previous he had purchased lumber to build a house on the land, but owing to misfortune

he was obliged to sell the lumber, but that he always intended when able to build a residence upon ¹⁶⁹ the land for himself and mother to live in as a home; that he had a team and wagon, and could make more by teaming and renting the farm on shares; that the product of the land was not sufficient to support himself and mother without additional labor on his part, so that for the last six years he had been teaming from Milford, Utah, to De La Mar, Nevada, whenever he could get work to do; that when out of work he went home to Annabella, and that he had no home except at Annabella, and that he paid the taxes on the farm and his poll tax in Annabella during the previous four years; that when at home he built ditches on the land and improved it by fencing; that during the time he was away teaming in Nevada he sent his mother small sums of money at different times for her support; that he gave her orders on a store for goods and provisions and paid her bills; that he was twenty-eight years old; that he was away from home freighting from 1894 to 1896, between Milford and De La Mar, Nevada, but was home a month of the time when his leg was broken; that most of the time during the last three years he had been away from home freighting, but came home several times during that period; that he had never voted in Nevada, although his name was signed to a registration blank; that he never took the oath nor authorized anyone to register him; that prior to the sale of the land notice was served upon the sheriff that the land was plaintiff's homestead.

Mrs. Bunker, the mother, aged sixty-nine years, testified in substance, that the plaintiff lived in the house where she lived; that plaintiff supported her and sent her money at different times, and gave her the proceeds of the land to live upon, as well as orders on a store. That he was away from home a great deal freighting in Utah and Nevada, but was home part of the time; that plaintiff ¹⁷⁰ said that he intended to keep this land for her support; that this was arranged between them.

Plaintiff's declaration of a homestead covering the land in question was recorded in Sevier county, and was received in evidence. Other evidence was given in corroboration and also in contradiction of plaintiff's testimony.

From the whole record we conclude that the testimony supported the findings and judgment. It clearly appears that the plaintiff was the head of a family and provided for the support of his aged mother from the proceeds of the land in question, and from his own labor; that such land was selected and used

as a homestead and for the support of his family; that notice was served upon the sheriff before the sale that plaintiff claimed the land as a homestead, and a declaration of the selection of such land as a homestead was duly recorded.

The temporary absence of the plaintiff from his residence for a year or two at one time, when attending to his occupation or business out of the state, in order to earn money with which to assist in providing for his family, coupled with a bona fide intention to return and reside there and to build a house upon the land, and the fact that he made visits home during such absence, did not constitute an abandonment of the homestead right.

The testimony clearly shows that plaintiff's residence was at Annabella, Utah; that when he left that place to obtain work his bona fide intention was to return there, and he did so return; that he never voted in Nevada or gained a residence there: Rev. Stats. 1898, sec. 806, subds. 1 and 4.

The fact that there was no dwelling-house upon the homestead and that plaintiff's mother resided with him one-half mile therefrom did not deprive him of his homestead ¹⁷¹ right, when it appears that the proceeds of the land were used for the support of his family, and the value of the land was within the homestead limit fixed by statute.

These questions were carefully considered and decided by this court in favor of the contention of the plaintiff in *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037; *Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973.

It is also contended by appellant under subdivision 2 of section 1154 of the Revised Statutes of 1898 that when the head of a family, as in this case, is not a married man and claims a homestead he must reside on the land claimed. This contention leads us to consider the provisions of the statute.

Section 1147 of the Revised Statutes of 1898 provides: "A homestead consisting of lands and appurtenances, which lands may be in one or more localities not exceeding in value with the appurtenances and improvements thereon the sum of fifteen hundred dollars for the head of the family, and the further sum of five hundred dollars for his wife, and two hundred and fifty dollars for each other member of his family, shall be exempt from judgment lien and from execution or forced sale, except as provided in this title."

Section 1154 of the Revised Statutes of 1898, so far as applicable, reads as follows: "Head of a Family Defined.—The phrase

'head of a family,' as used in this title includes within its meaning . . . every person who has residing on the premises with him or her and under his or her care and maintenance, either his or her child, . . . mother, etc."

In the case of *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037, this court construed the meaning of the words "a homestead, consisting of lands and appurtenances, which land may be in one or more localities not exceeding the value of," etc., as contained in section 11, ¹⁷³ chapter 71, of Session Laws of 1896, and re-enacted in section 1154 of the Revised Statutes of 1898, as follows: "The statute does not contemplate that the debtor's house or place of residence shall necessarily be located upon the property claimed as exempt; since several distinct pieces of land in the same or different localities or counties may constitute the homestead when selected, and it would not be reasonable to require that the debtor should have a dwelling-house or residence on each piece of land going to make up his homestead, and also to require him to reside in each dwelling thereon, in order to protect such homestead rights from execution creditors."

In *Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973, the same principle is announced.

Subdivision 2 of section 1154, above referred to, should be construed in harmony with section 1147. Therefore, the plaintiff would be the head of a family if his mother resided with him, and was under his care and maintenance, as shown by the facts in this case. Being the head of a family, his actual residence upon the land claimed as a homestead would not be necessary in order to render it exempt from execution. In such a case the rule applies to unmarried men who have charge of and are the head of a family the same as to a married man, or other person named in the statute. Manifestly, the legislature did not intend to lay down one rule governing heads of families consisting of married men, and other heads of families consisting of unmarried men, or other persons entitled to the homestead right, who might have greater responsibilities thrust upon them than the former class. It would be unreasonable to discriminate between persons of different classes, when the statute granting the right gives the homestead to all heads of families, to lands and appurtenances situated in one or more localities. So it would ¹⁷³ not be reasonable to require a residence on the land when the head of the family owned one piece with no dwelling-house thereon, but which is used for the support of

the family, and not require such residence when he owns several pieces. The head of a family resides on the homestead, within the meaning of the statute, when he has the care and maintenance of a family who reside on or near the homestead, or some part of it, and who derive their support, in whole or in part, from the proceeds of such land used or intended, in good faith, as a homestead. In this view section 1154 is in harmony with section 1147.

The reasoning of this court, contained in *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037, and *Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. 973, is considered decisive of the question here presented.

Appellants also contend that the court erred in refusing to admit in evidence that part of the contract or note on which the judgment was rendered in the former action, as showing a waiver of plaintiff's exemption right to the land levied upon. This clause reads as follows: "As to this debt we waive the right to exempt or claim as exempt any property, real or personal, we now own or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force or that may hereafter be enacted."

In *Waples on Homesteads and Exemptions*, page 538, it is said: "Rights of defense, when life, liberty, or property are assailed, cannot be denied by courts because they have been relinquished anterior to the time of attack. Rights, not only natural but legal, which are given for defense, cannot be abjured by the beneficiary so as to deprive ¹⁷⁴ courts of the power to enforce them when subsequently pleaded. Remedies conferred by law cannot be waived by mere agreement not to claim them so as to divest courts of the duty of according them if they be afterward claimed by one of the contracting parties."

So on page 546 he says: "No such act on the part of a husband or father, or of a wife or widow, or of any person, as might estop him or her personally from claiming a homestead right, can possibly debar others who have rights therein from their interest. Such rights of others render his own inviolable, since they are inseparable from his. What might be an act in pais operating as an estoppel were he alone concerned would not be such when the rights of those to be protected through him are involved. He would not be estopped from claiming homestead, though he had solemnly promised not to claim, and had received a consideration equivalent to the value of his right."

Following these principles it is generally held that the right to claim either real or personal property as the law exempts cannot be waived by a general waiver in an executory contract. The taking away of the right to surrender future protection under exemption laws is based upon public policy and the probable needs of the family, the improvidence of many people when making contracts to be performed in the future, the danger of the weak being overreached by the strong, the interest of the state in preventing pauperism, and the necessity of guarding the impecunious from their own want of caution when releasing rights before the occasion of asserting them arises.

In our opinion the homestead right, when vested in the head of a family as guaranteed by the constitution and laws of this state, is not a right to the husband or other head of the family for their protection alone, but it is as ¹⁷⁵ well bestowed upon those enumerated in the statute as members of his household and under his care, protection, and maintenance while the statutory relation exists. It was intended to secure and protect the home as such not only against creditors, but as against every act on the part of the head of the family not authorized by law, by which he could in advance barter away the right to the homestead, and thereby sacrifice the home as against himself and those constituting his family and under his care and maintenance. Therefore, no waiver of the homestead right, as contained in the contract offered in evidence could affect the right of the head of the family, or those under his care and maintenance as members of his legal household. To uphold such a contract would be against public policy.

The doctrine announced in this opinion should not be construed as preventing the head of the family, who is the owner of land, from conveying or encumbering his homestead under the provisions of the statute: *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037, 19 Utah, 161, 56 Pac. 973; *Stafford v. Elliott*, 59 Ga. 837; *Showers v. Robinson*, 43 Mich. 502, 5 N. W. 988; *Waples on Homesteads and Exemptions*, 538, 540, 542, 545; *Knettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46; *Phelps v. Phelps*, 72 Ill. 549, 22 Am. Rep. 149; *Shapley v. Abbott*, 42 N. Y. 451, 1 Am. Rep. 548; *Harper v. Leal*, 10 How. Pr. 282; *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Maxwell v. Reed*, 7 Wis. (*582) 493; *Beecher v. Baldy*, 7 Mich. 488.

We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

Baskin, J., concurs.

Bartch, C. J., concurs in affirming the judgment.

HOMESTEAD—HEAD OF FAMILY.—An unmarried man living on his own land with his mother, sisters, and brother, in his own house, and contributing to their support, is the head of a family and entitled to a homestead: *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714, 54 S. W. 488. So, too, is a widower without children, whose mother is the sole member of his family, if he supports her: See the monographic note to *Wike v. Garner*, 70 Am. St. Rep. 109.

HOMESTEAD.—ACTUAL OCCUPANCY, under the code of Alabama, is essential to a valid claim of homestead exemption: *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110, 18 South. 210. That this strict rule is not recognized in some jurisdictions, see monographic note to *Pryor v. Stone*, 70 Am. Dec. 347-353; *Upton v. Coxen*, 60 Kan. 1, 72 Am. St. Rep. 841, 55 Pac. 284. If a husband and wife own adjacent tracts of land cultivated as one farm, he may hold his tract as a homestead, though the house in which he and his family reside is not upon his land but upon hers: *Mason v. Columbia Finance etc. Co.*, 99 Ky. 117, 59 Am. St. Rep. 451, 35 S. W. 115.

HOMESTEAD—ABANDONMENT OF.—A temporary absence from a homestead, with an intention of returning, is not an abandonment: *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838. Removing from a homestead and residing elsewhere temporarily for the purpose of business, health, or pleasure, does not work an abandonment unless there is an intention not to return: *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202. But see *Conway v. Nichols*, 106 Iowa, 358, 68 Am. St. Rep. 811, 76 N. W. 681.

WILLOW CREEK IRRIGATION CO. v. MICHAELSON.

[21 Utah, 248, 60 Pac. 943.]

WATERS AND WATERCOURSES—APPROPRIATION—PERCOLATING WATERS.—A statute conferring the right to divert and use the unappropriated water of "any natural stream, watercourse, lake, spring, or other natural source of supply," must be construed to mean a natural stream or other natural source of supply flowing or situated upon lands over which the sovereignty has dominion or which forms a part of the public domain, and not to streams or springs, or other waters arising through percolation upon land, after it had been segregated from the public domain and the title thereto passed into private ownership. The statute cannot be so interpreted as to include a stream flowing from a bog or marsh, which does not make its appearance upon the surface until after the land has passed into private ownership.

WATERS AND WATERCOURSES—PERCOLATING WATERS—APPROPRIATION.—Water percolating through the soil, or flowing in a subterranean stream, having no defined or known

channels, courses, or banks, forms a part of the realty, and belongs to the owner of the soil and is not subject to appropriation.

W A T E R S A N D W A T E R C O U R S E S — P E R C O L A T I N G W A T E R S — O W N E R S H I P.—A conveyance or grant by the United States of any part of the public domain to a person, natural or artificial, carries with it the right to filtrating or percolating water and to streams flowing in the soil beneath the surface in undefined and unknown channels.

W A T E R S A N D W A T E R C O U R S E S — P E R C O L A T I N G W A T E R S.—Water intermingling with the ground or flowing through it by filtration or percolation, or by chemical attraction, is but a component part of the earth, and has no characteristic of ownership distinct from the land itself.

W. K. Reid and J. W. Cherry, for the appellants.

W. D. Livingston and A. H. Christenson, for the respondent.

²⁵¹ **BARTCH, C. J.** This action was brought to restrain the defendant from interfering with the water of a certain spring and to quiet title to the use of the water in the plaintiffs.

It appears from the findings of fact, which are not disputed, that the plaintiff company is a corporation duly organized and existing under the laws of Utah, and its business is to control and distribute to its stockholders, for the purposes of irrigation, the water of Willow creek and ²⁵² its tributaries, in the county of San Pete, state of Utah. The stockholders are owners of land which is being irrigated from that stream, and the plaintiffs are the owners by appropriation of all the waters flowing therein. In the year 1891 the United States government conveyed by patent to the defendant a certain tract of land, and thereafter water appeared on the land from natural causes and formed a bog or marsh. The water stood still in a natural depression covering about three-fourths of an acre of land and increased in volume until 1895, when it flowed in a stream through a natural depression into Willow creek, and thereafter continued to flow from the bog or marsh into that creek, and the plaintiffs used it with the other water of the stream. In October, 1898, and January, 1899, the defendant, by means of a dam, diverted the water flowing from the bog or marsh, and thereby prevented its flowing into Willow creek and its use by the plaintiffs. The defendant thus diverted the water, claiming ownership thereof and right to its use upon her land. At the trial the court rendered judgment in favor of the defendant.

The decisive question to be determined upon this appeal is whether the defendant, by virtue of her patent to the land on which the bog or marsh was formed, is the owner of the water

in dispute. The appellants contend that notwithstanding the fact that, at the time the government conveyed the land to the respondent, there was no bog or marsh thereon nor any water issuing or flowing therefrom, the stream, which afterward began to flow and thenceforward continued to flow therefrom, was a natural stream and subject to appropriation under section 2780 of the Compiled Laws of Utah of 1888, and that they had a right to and did appropriate the water thereof. The respondent insists that since, at the time the title to the land vested in her, the ²⁵³ water in question had not come to the surface and its existence was unknown, the right to such water passed to her with the title to the land, as a part of the purchase, and was not included within the terms of the statute and not subject to appropriation.

In the section of the statute referred to it is provided: "A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued as a primary right to the extent of, and reasonable necessity for, such use thereof, under any of the following circumstances: 1. Whenever any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, watercourse, lake, or spring, or other natural source of supply."

Undoubtedly, under this provision any person or persons may divert and use of the unappropriated water of any "natural stream, watercourse, lake, or spring, or other natural source of supply" for any of the purposes mentioned in the statute, but it is evident that the enactment, although comprehensive terms are employed therein in reference to the appropriation and use of water, for the purposes of irrigation, must be construed to mean a "natural stream, or other natural source of supply," flowing or situated upon lands over which the sovereignty has dominion, or which forms a part of the public domain, and not to streams, or springs, or other waters arising through percolation upon land, after it has been segregated from the public domain, and the title thereto passed into private ownership. The statute, therefore, cannot be so interpreted as to include a stream flowing from a bog or marsh like the one in the case at bar, which did not make its appearance upon the surface until after the ²⁵⁴ land had been purchased from the government by a private individual.

When the United States issued its patent to the respondent neither the bog nor marsh nor the water in question was visible upon the land conveyed. Nor was there any known and defined subterranean stream thereon. At that time the water, if it existed at all, was percolating through the soil, or flowing in a subterranean stream, having no defined or known channels, courses, or banks. Water so percolating and flowing forms a part of the realty, and belongs to the owner of the soil. A conveyance or grant by the United States of any part of the public domain to a person natural or artificial, carries with it the right of filtrating or percolating water, and to streams flowing through the soil beneath the surface, but in undefined and unknown channels, just the same as it carries with it the right to rocks and minerals in the ground which have not been reserved in the instrument of conveyance, or by statute. Water intermingling with the ground or flowing through it by filtration or percolation or by chemical attraction is but a component part of the earth, and has no characteristic of ownership distinct from the land itself. In the eye of the law water so commingled and flowing or motionless underneath the surface is not the subject of ownership apart and distinct from the soil. If, however, subsurface streams of water flow in clearly defined channels, it is otherwise, for then the rules of law applicable to surface streams and waters apply.

In Gould on Waters, section 280, the author says: "Water percolating through the ground beneath the surface, either without a definite channel or in courses which are unknown and unascertainable, belongs to the realty in which it is found. The rule that a man may freely ²⁵⁵ and absolutely use his property, so long as he does not directly invade that of his neighbor, or consequentially injure his clearly defined rights, is applicable to the interruption of subsurface supplies of water or of a stream, and the damage resulting therefrom is not the subject of legal redress. The land owner may, therefore, make a ditch to drain his land, or dig a well thereon, or open and work a quarry upon it, or otherwise change its natural condition, although by so doing he interrupts the underground sources of a spring or well on his neighbor's land."

So in Kinney on Irrigation, section 49, it is said: "Percolating waters are those which pass through the ground beneath the surface without definite channels, although the same rules of law govern those which have definite channels, but the course of which is unknown and unascertainable. Where there is

nothing to show that the waters of a spring or well are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil. Percolating waters and those whose sources are unknown belong to the realty in which it is found."

In *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433, Mr. Justice Finch, delivering the opinion of the court, said: "Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to watercourses and their diversion apply: *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. 553; *Rawstron v. Taylor*, 33 Eng. L. & Eq. 435; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Goodale v. Tuttle*, 29 N. Y. 466; *Ellis v. Duncan*, 21 Barb. 234; *Barkley v. Wilcox*, 86 N. Y. 147, 40 Am. Rep. 519. The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious and flow in a natural channel between defined banks. A few exceptions ²⁵⁶ are admitted to exist and others may occur; but outside of these subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion of watercourses, and they may be intercepted or diverted by the owner of the land for any purpose of his own."

In *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746, 65 N. W. 911, it was said: "As the hidden water in the plaintiff's soil belonged to him as a part of it, he might by artificial means separate it from the soil, and it would still belong to him. He might sink a well, into which such water would work its way, and the accumulation in the well would still be his, and subject to his proprietary control."

So in *Frazier v. Brown*, 12 Ohio St. 294, it was observed: "The law cannot properly limit the ordinarily absolute dominion of the owner of the soil, in respect to things concealed and hidden in the bowels of the earth, nor recognize an adjoining proprietor as having claims upon or rights in a thing passing under the surface of his neighbor's land, the existence of which was first revealed by the very act which would constitute the subject matter of his complaint."

And in *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244, this court said: "The waters issuing from the artificial tunnel into the lake are found to be underground, percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream

with a well-defined channel, banks, and course. Under such a state of facts the law seems to be well settled that water percolating through the soil is not, and cannot be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation. The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with ²⁵⁷ undefined and unknown courses and banks": Kinney on Irrigation, sec. 48; Washburn on Easements and Servitudes, p. 505, par. 2; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Haldeman v. Bruckhart, 45 Pa. St. 514, 84 Am. Dec. 511; Acton v. Blundell, 12 Mees. & W. 324; Taylor v. Welch, 6 Or. 199; Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783; Ocean Grove v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; Williams v. Ladew, 161 Pa. St. 283, 41 Am. St. Rep. 891, 29 Atl. 54; Mosier v. Caldwell, 7 Nev. 363; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Chatfield v. Wilson, 28 Vt. 49; Trustees etc. v. Youmans, 50 Barb. 316.

It appearing in the case at bar that at the time of the conveyance of the land by the government the water in question was not visible thereon, nor its existence known, and there being nothing to show that it flowed thereon at any previous time, or that there was at the time of the purchase any well-defined and known subterranean stream there, the presumption is that the water was percolating through the earth, and that the stream in question is the result of filtration or percolation; and the water having commenced to flow after the patent was issued, it belongs, under the authorities, as we have seen, to the respondent or owner of the land as a part thereof. The water was, therefore, not subject to appropriation under any statute or rule of law, and by its use the appellant acquired no title to it. Hence the respondent had the lawful right to divert and use the water in such manner as she chose, and may continue to do so. The court committed no error in deciding this case in her favor.

The judgment is affirmed with costs.

McCarty, D. J., concurs.

Baskin, J., concurs in the result.

PERCOLATING WATERS ARE PARTS OF THE EARTH itself, as much as the soil and stones, with the same absolute right

of use and appropriation by the owner of the land: *Wheelock v. Jacobs*, 70 Vt. 162, 87 Am. St. Rep. 659, 40 Atl. 41. See, further, *Metcalf v. Nelson*, 8 S. Dak. 37, 59 Am. St. Rep. 746, 65 N. W. 911; note to *Wheatley v. Baugh*, 64 Am. Dec. 727, 728. As to what are percolating waters, see the monographic note to *Wheelock v. Jacobs*, 87 Am. St. Rep. 663-672.

THE RIGHT TO APPROPRIATE WATER APPLIES only to the public lands, and cannot be exercised to the prejudice of the rights of riparian proprietors: *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495.

KONOLD v. RIO GRANDE WESTERN RAILWAY CO.

[21 Utah, 379, 60 Pac. 1021.]

NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury to a railroad engineer caused by the explosion of the boiler of a locomotive in his charge, alleged to have been due to defects known to the company but unknown to such engineer, and the question of negligence depending upon the time taken to run from one station to another, between which the explosion occurred, old timetables of the company not in effect at the time of the accident are not admissible in evidence to show that no unusual danger was incurred by violating the requirements of the existing time card, unless it is shown that the conditions were the same at date of the timetables as at the time of the accident.

MASTER AND SERVANT—DISREGARD OF RULES AND REGULATIONS—ABROGATION.—If rules and regulations established by the master are habitually disobeyed, with the knowledge or express consent of the master, or have been disregarded without his express consent in such a manner, and for such a length of time, as to raise a presumption that the master must have become aware of such habitual disregard, and approved it, such rules and regulations must be regarded as abrogated.

MASTER AND SERVANT—ABROGATION OF RULES AND REGULATIONS.—EVIDENCE showing a violation of rules and regulations as to the running time of trains between stations on two occasions only, and one of them being at the time of an accident, is not sufficient to show that such rules and regulations have been abrogated.

AGENCY—NEGLIGENCE OF AGENT—EVIDENCE.—If the negligence of an agent on a particular occasion is in issue in the case, evidence that he was negligent on other occasions is not admissible.

TRIAL—INSTRUCTIONS REQUESTED NEED NOT BE GIVEN when they are fully covered by instructions already given.

MASTER AND SERVANT—ASSUMPTION OF RISK.—The rule as to the assumption of risk by a servant is, that the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for his use. And an instruction that the servant "did not undertake to incur risks arising from defective machinery, or other instruments with which he is at

work, his contract implied that in regard to these matters the master would make adequate provision that no unnecessary danger should ensue to him," is erroneous as incorrectly stating the rule.

TRIAL—INSTRUCTIONS.—The giving of inconsistent or contradictory instructions on a material point in the case is error.

EVIDENCE.—EXPERIMENTS are not competent as evidence unless the conditions under which they are made are the same, or proximately the same, as those which attended the event in regard to which the experiments are made. The admission of such evidence being discretionary with the trial judge, his decision cannot be reviewed, except in case of palpable abuse of such discretion.

Bennett, Harkness, Howat, Bradley & Richards, for the appellant.

C. C. Richards, E. M. Allison, Jr., and H. R. MacMillan, for the respondent.

387 **BASKIN, J.** This is an action for the recovery of damages on account of injuries sustained by plaintiff on the twenty-seventh day of May, 1896, while in the employ of defendant, as an engineer on its railroad, alleged to have been caused by the explosion of a defective boiler, which the plaintiff, in the discharge of his duties as engineer of the defendant, was engaged in using, and of which defects the defendant was, but the plaintiff was not, aware.

The answer denied these allegations and alleged contributory negligence on the part of plaintiff. Upon the trial the jury returned a verdict in favor of the plaintiff for eight thousand dollars, and judgment for that sum was rendered against defendant. From this judgment the defendant has appealed.

1. The plaintiff, as engineer, was in charge of the locomotive on which the explosion which caused the injury occurred, and in running the train it was his duty to observe the reasonable and proper rules and regulations of his employer. If he failed to do so, and such failure directly contributed to his injury, he cannot recover, in the absence of some legitimate excuse for his disobedience of such rules and regulations: *Thompson on Negligence*, sec. 23, p. 1018; *Bailey on Masters' Liability*, 88, 89; *Wolsey v. Lake Shore R. R. Co.*, 33 Ohio St. 227; *Krew v. St. Louis etc. Ry. Co.*, 20 Fed. 87; *Lyon v. Detroit etc. R. R. Co.*, 31 Mich. 429; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Memphis etc. Ry. Co. v. Thomas*, 51 Miss. 637.

It appears from the evidence that the train, the number of which was 20, consisted of thirty-two freight-cars, weighing ³⁸⁸ eight hundred and thirty tons; that it reached Lower Crossing more than an hour behind time; that the distance from Lower

Crossing to Clift. Siding, between which places the explosion occurred is five and seven-tenths miles, and the railroad track between these places is a single one.

The plaintiff testified that: "It is a little down grade, if anything, going east out of Lower Crossing. Then there is a light grade, running from seven-tenths to nine-tenths of one per cent. That grade continues to within eight hundred feet of where the explosion occurred, and from there to where the explosion occurred it is level. We had got over the hill and onto the level about eight hundred or nine hundred feet before the explosion occurred; just about the length of my train." He also testified that "when we left Lower Crossing we had to make a meeting point with a passenger train at Clift. Siding."

The passenger train was on time and was due at that point at 4:54 P. M. The plaintiff also testified that the train left Lower Crossing at 4:30 P. M.

William Allen, the agent and telegraph operator of the railroad at Lower Crossing, testified without objection by respondent, that he was on duty there on the day of the explosion; that it was his duty to enter the arrival and departure of each train on a sheet provided for that purpose by the company; that on that day the train on which the plaintiff was injured left Lower Crossing, going toward Clift. Siding at 4:33 $\frac{3}{4}$ P. M., and that he entered the time of departure at 4:33 P. M., because fractions of minutes, under the instructions of the company were not to be entered.

Counsel for the appellant state in their brief, and it is not disputed by counsel for respondent, that the sheet in which this entry was made was used in the former trial of this case and was lost at that trial.

389 The plaintiff on cross-examination stated in substance that he knew it was the duty of the station agent at said crossing to take down the time the train left, and wire it to the dispatcher in Salt Lake City; that he believed such to be the rule of the company, and they have a clock there for that purpose; that he saw at the former trial the record made by Allen saying that the train left at 4:33 P. M., and heard him testify that he made it correctly, except that he gave us the benefit of three-fourths of a minute, but that the record was not correct. He also stated that he had a time card for his guidance in running the train. This card was introduced in evidence by the defendant, and in terms allowed thirty minutes in which to run that train from Lower Crossing to Clift. Siding.

The plaintiff on cross-examination further stated that he had at the time also a book containing the regulations of the company for his guidance as an engineer. The defendant introduced and read in evidence from said book the following:

"Notice.—A perfect familiarity with, and a strict observance of, these rules will be expected of and required from all employés.

"Train Rules.—Rule 86: When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the side, and clear the train of superior class five minutes. The train of inferior class must keep five minutes off the time of the train of superior class following it."

Respondent's counsel state in their brief that this rule required freight trains, when meeting passenger trains, to get on to the sidetrack five minutes before the passenger trains were due.

We think that such is the requirement of that rule, so that if as stated by plaintiff the train left Lower Crossing ³⁹⁰ at 4:30 P. M., it would have to make the run to Clift. Siding in nineteen minutes in order to properly clear the way for the approaching passenger train, and if as stated by Allen it left at 4:33 P. M., it would have to make the run in sixteen minutes.

Plaintiff made no objection to the admission in evidence of the time card and the portions of said book read to the jury; but in rebuttal thereof, and for the purpose of showing that no unusual danger was incurred by violating the requirements of the time card, and the rules and regulations of the company, offered in evidence four of the company's timetables, the first of which went into effect March 31, 1895, the second January 17, 1897, the third November 3, 1897, and the fourth March 5, 1898. The running time for freight trains from Lower Crossing to Clift. Siding fixed by these timetables was, respectively, 22, 25, 23, and 18 minutes. These timetables were not in effect at the time the plaintiff was injured, and did not impose upon him any duties. His duties in respect to the running of the train were those prescribed in the aforesaid time card and book of rules and regulations of the company.

The defendant objected to the introduction of each of these four timetables, as they were severally introduced, on the grounds that they were immaterial, not being in effect at the time of the accident, and it not having been shown that the conditions which attended the trains, to which said timetables related, were the same as the conditions which attended the train

on which the plaintiff was injured in this: It was not shown that the engines were the same, or that the trains were the same, or were of the same class. The objection was overruled and the proffered evidence admitted.

There can be no doubt but that unless the conditions ³⁹¹ were the same, and the plaintiff first laid the foundation for the admission of said timetables by proof of that fact, the trial court erred in overruling the objection.

Respondent's counsel state in their brief that "the same conditions were not shown to exist when the timetables were received in evidence," but claim that later on in the trial the objections thereto were obviated by the testimony of Mr. Allen, a witness for the defendant. On cross-examination Mr. Allen stated that he did not know whether the engines were the same, and no other witness stated that they were the same. Nor was it shown, or any attempt made to show, that any of the trains, subject to said timetables, which were hauled were composed approximately of the same number of cars, or were approximately of the same weight, as the train on which the explosion occurred. The engines used in moving said trains may have had sufficient capacity to haul a train of much greater capacity and weight than the one on which the explosion occurred from Lower Crossing to Clift. Siding in a shorter time than even eighteen minutes; and no engine of the same or approximate capacity may ever have drawn any train, which was subject to said timetables, of the same or approximate size and weight as the one in charge of plaintiff, from Lower Crossing to Clift. Siding, in the time attempted by plaintiff, and nothing to the contrary appears from the showing made.

Mr. Allen on cross-examination further stated that two of said trains were of the same class as the one in charge of plaintiff, but that fact does not obviate the objection.

2. Respondent's counsel in their brief state that: "It is not denied that it was the duty of conductors and engineers in running their trains to obey the rules and regulations promulgated by their superiors for their guidance, ³⁹² provided that such rules and regulations are reasonable and are enforced," but claim that the printed rules and time cards of the company were not enforced, but were habitually violated, and that therefore the plaintiff was not bound to obey the same. The true rule on this subject is that when the rules and regulations established by the master are habitually disobeyed, with the knowledge or express consent of the master, or have been disregarded without

his express consent in such a manner, and for such a length of time, as to raise a presumption that the master (whose duty it is not only to make and promulgate, whenever engaged in a business of such a nature as to require it, suitable rules and regulations for the protection of his servants, but also to use due care and diligence to have them enforced: *Pool v. Southern Pac. Co.*, 20 Utah, 210, 58 Pac. 328, 329), must have become aware of such habitual disregard, and approved the same, such rules and regulations will be regarded as abrogated. This view is sustained by the opinion of Mr. Justice Bartch and the cases cited therein in the case of *Wright v. Southern Pac. Co.*, 14 Utah, 394, 395, 46 Pac. 374.

There is no evidence tending to show that the company expressly authorized any infractions of its rules or regulations, or that its officers had actual knowledge of any violation of the same, except in the one instance hereinafter mentioned. Therefore, if the rules and regulations of the company were ever abrogated, it must have been done by the habitual disregard of the same in such a manner and for such a length of time as to raise the presumption before mentioned.

It appears from the evidence upon this point that previous to the explosion the plaintiff had made three round trips, in which, going and returning, he passed Lower Crossing and Clift. Siding six times; that he started ³⁰³ on the first trip on the first day of May, 1896, and returned on the third day of that month. When the other trips were made does not appear. The explosion occurred on the 27th of that month.

In the examination in chief of plaintiff he was asked the following questions, and answered as follows: "Q. How often had you gone over that road? Judge Howat says once. A. I had made three round trips prior to that time. Q. Six times you went past there, isn't it? A. Yes, sir; on that particular division. Q. Do you know the custom that existed—do you know the practice that obtained on defendant's road at this point, when a superior train was to meet an inferior train, as to how soon the inferior train should get to the meeting point before the arrival of the superior train. A. Yes, sir. Q. Now state, if you please, what that custom is—practice. A. The practice was that if we got there in the clear sufficient time, to get out of the way of the passenger, or in case of not being there in time, to put in protected, was all that was required of us by the practice. Q. What was protected? A. To send out a flagman a distance, that they can plainly see us and stop their train in

case we didn't get on the switch, or anything happened we could not get in."

On cross-examination he stated that in making these three round trips he did not meet any passenger trains at Clift. Siding going from Lower Crossing; that he understood it to be the practice in meeting passenger trains at Clift. Siding to disregard said instructions; that he didn't ³⁹⁴ have any instructions on that day (the day of the injury) with regard to the running at that particular point except the time card.

Mr. Allen further testified that: "It was the practice for the train men not to undertake to get their trains up from Lower Crossing to Clift. Siding, and sidetrack them, in less than thirty-five minutes, as against the passenger train. There are second-class trains which are only allowed to carry five hundred and fifty tons, which would take less time to go"; that he only knew of one violation of this practice, and in that connection he made the following statement: "There are some things which impressed on my mind this one time when the train came in in less time against the passenger train, and that is, that General Superintendent Welby was on the passenger train that day, and the conductor came in on front of the engine, on the pilot, just about the time; just a little before the passenger train was due, only a minute or so, and the conductor was not on the road but a very short time after that."

The train on which the plaintiff was injured at the time of the injury was running against a passenger train. There was no evidence whatever adduced in the case showing or tending to show that a train of any class ever made or attempted to run from Lower Crossing to Clift. Siding against a passenger train in less time than was provided by the rules or regulations of the company, but twice; once on the occasion mentioned by the witness Allen, and on the occasion when the plaintiff was injured.

The evidence was not sufficient to show that the rules and regulations of the company, so far as they related to the train on which the plaintiff was injured, had been abrogated, or to raise in regard to the same the presumption before mentioned. Therefore, the admission of the testimony objected to by the defendant was error.

³⁹⁵ 3. The following instruction predicated upon the evidence relating to the abrogation of the rules and regulations of the company was given: "If the defendant company suffered for a length of time amounting to approval, or actually ap-

proved the habitual disregard of any of its rules and regulations in evidence, then in that case such rule so habitually disregarded, if it were disregarded, was inoperative and abrogated, and the practice followed became the rule."

An exception to this instruction was duly taken by the defendant, based upon the objection that there was no evidence on which to predicate it.

It follows from our conclusion on this question hereinbefore announced that the objection should have been sustained.

4. For the purpose of breaking the force of the entry of the time at which the wrecked train left Lower Crossing, and which entry was conceded to have been made by Allen, as agent, on the sheet furnished to him by the company for that purpose, and which the plaintiff in his testimony stated it was the duty of Allen, as agent, to make, and that he had made an entry of the time, but not correctly, plaintiff's attorney asked him the following questions: "Q. What is the practice pursued by railroad agents in making records, as to having it exact or otherwise? Q. What was the practice as to making the departure and arrival of trains correctly?"

Defendant's attorney made the following objection to these questions: "I object to that as being immaterial and incompetent, for the reason that it does not refer to this particular entry, made by the station agent at Lower Crossing; if that was correct, it was immaterial whether other people indulged in the practice of being incorrect or not."

³⁹⁶ This objection was overruled and the plaintiff made the following answers: "A. They are not always made correctly. A. Very often they would ask some engineer, or someone else sitting around the office, as to what time the train did depart, and record it that way."

The questions were not confined to the practice of Allen, nor do the answers assert that it was his practice to make false entries. The fact that it was the practice of other agents to disregard their duties, did not tend to show that such was the practice of Allen, or that the entry in question was false.

Even when the negligence of an agent on a particular occasion is an issue in the case, evidence that he was negligent on other occasions is not admissible, and has no legitimate bearing upon the question: *Maguire v. Middlesex Ry. Co.*, 115 Mass. 239; *Chicago etc. Ry. Co. v. Hodge*, 55 Ill. App. 166. The objection of defendant should have been sustained.

5. The defendant asked the trial court to give the following instruction: "When the plaintiff entered the service of the defendant company as a locomotive engineer, he assumed all the risks of the occupation that were ordinarily incident to it, and all risks arising from the defective condition of the machinery and appliances that were not observable by the defendant in the exercise of ordinary care, and for an injury to himself arising from any of these assumed risks, the plaintiff cannot recover." This instruction the court refused to give as requested, but modified the same by adding thereto the following: "The plaintiff did not undertake to incur risks arising from defective machinery or other instruments with ³⁹⁷ which he is to work; his contract implied that in regard to these matters the defendant would make adequate provision that no unnecessary danger should ensue to him," and gave the instruction as modified.

The defendant excepted to the refusal to give the instruction requested, and also to the giving of the instruction as modified.

This modification is not consistent with that portion of the modified instruction which the defendant requested to be given, and is contradictory to and inconsistent with other instructions given by the court.

The thirteenth instruction given by the court is as follows: "The defendant was not required to warrant the perfection of its machinery or appliances, or to insure its employes from injury from boiler explosions or other like accidents; the defendant's duty to the employes was only to use due care and diligence, first, to furnish a suitable and safe engine, and the due care and diligence to keep it in that condition. And by 'due care and diligence,' I mean the care and diligence which a man of ordinary prudence, engaged in like business, would exercise for his own protection and the protection of the property."

Other instructions of like character were also given. These instructions correctly stated the law applicable to this branch of the case, and therefore no error was committed in refusing to give the instruction asked for by defendant, because the instructions given fully covered the same ground. The objectionable part of the modified instruction is the modification. The modification is based upon the language used by Judge Field in the case of *Northern Pac. Ry. Co. v. Herbert*, 116 U. S. 648, 6 Sup. Ct. Rep. 593, which is as follows: "The

servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other ~~ses~~ instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

In connection with this language Judge Field cites the case of *Hough v. Railway Co.*, 100 U. S. 217, and quoted language therefrom which modifies the language used by him. In the opinion in that case it is said that: "One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter."

In the case of *Washington etc. R. R. Co. v. McDade*, 135 U. S. 569, 10 Sup. Ct. Rep. 1049, the instruction to the jury was as follows: "The jury are instructed that the defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe."

In passing upon the validity of this and other like instructions the court said: "We do not think there was any error in any of these instructions of which the defendant had any right to complain. The propositions contained in them are in strict accord with the principles laid down by the decisions of this court." And cited in support thereof the following cases: *Hough v. Railway Co.*, 100 U. S. 213, 217; *Northern Pac. Ry. Co. ~~vs~~ v. Herbert*, 116 U. S. 642, 647, 6 Sup. Ct. Rep. 590; *Kane v. Northern Cent. Ry. Co.*, 128 U. S. 91, 94, 9 Sup. Ct. Rep. 16; *Jones v. East Tennessee etc. R. R. Co.*, 128 U. S. 443, 9 Sup. Ct. Rep. 118. A note at the end of the opinion indicates that Judge Field sat in the case.

From the foregoing facts it is clear that the case of *Northern Pac. Ry. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, does not warrant said modification, but that it is against the rule settled by the United States supreme court. The

cases of other courts holding the same doctrine are numerous. In fact, there is no conflict in regard to the rule.

6. Respondent contends that all of the instructions should be construed together, and that the thirteenth instruction before quoted, and those of the same character given, "fully protected the appellant on this point" (the one raised by appellant on the modified instruction).

Instructions on a material point in the case which are inconsistent or contradictory should not be given. The giving of such instructions is error and a sufficient ground of reversal, because it is impossible after verdict to ascertain which instruction the jury followed, or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary.

7. The appellant claimed at the trial that the contributory negligence of the plaintiff consisted of allowing the water in the boiler to become so low as to leave a portion of the crown sheet bare and become heated to a red heat, and thus cause the explosion.

To establish this the defendant offered to prove certain experiments by H. V. Wille, a mechanical engineer and expert, which he had made for the express purpose of determining the cause of the explosion. Objection having been made by plaintiff on the ground that the conditions, ⁴⁰⁰ as stated by Wille, under which he made the experiments were not the same or so similar as those attending the explosion "that the court and jury could say that the result would be the same," the court refused to permit the experiments to be submitted to the jury. There is nothing in the abstract which shows that Wille, as an expert, expressed any opinion as to the cause of the explosion, therefore the cases cited by appellant's counsel which hold that one who has given his opinion in evidence, as an expert, may also be permitted to testify to the grounds of the opinion expressed, which frequently includes evidence of experiments made during the course of his investigation of the subject to which his testimony relates (12 Am. & Eng. Ency. of Law, 2d ed., 409, and cases there cited), among which is the case of *People v. Thompson*, 122 Mich. 411, 81 N. W. 344, and upon which counsel for appellant laid much stress. The general rule on the subject is that experiments are not competent as evidence unless the conditions under which they are made are the same or approximately the same as those which attended the event in regard to which the experiments are made.

In passing upon the admissibility of such evidence the presiding judge exercises a discretionary power, and his decision, except in a case of palpable abuse of the discretion, will not be reviewed by an appellate court: 12 Am. & Eng. Ency. of Law, 400, and cases cited; *State v. Webb*, 18 Utah, 441, 56 Pac. 159.

The foundation laid for the admission of said experiments was in some particulars unsatisfactory, and therefore we do not think that such an abuse of discretion appears as would justify a reversal of the judgment. It is not necessary to pass upon the other questions raised in the case.

⁴⁰¹ It is ordered that the judgment be reversed at the costs of respondent, and that the case be remanded with directions to the court below to grant a new trial.

Bartch, C. J., and Miner, J., concur.

A MASTER OWES TO HIS SERVANT THE DUTY of providing him a reasonably safe place in which to work, and reasonably safe tools and appliances for the work to be done, and of exercising diligence in the employment of reasonably competent men to perform their respective duties: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 591, 592; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519.

RAILROAD.—THAT THE RULES of a railway company prescribing the duties of its employes and the manner of performing them may be abandoned or abrogated by usage, see *Barry v. Hannibal etc. Ry. Co.*, 98 Mo. 62, 14 Am. St. Rep. 610, 11 S. W. 308. Compare *Gordy v. New York etc. R. R. Co.*, 75 Md. 297, 32 Am. St. Rep. 391, 23 Atl. 607.

EVIDENCE.—PERMITTING EXPERIMENTS before a jury rests largely in the discretion of the court: See the monographic note to *Chicago etc. R. R. Co. v. Champion*, 53 Am. St. Rep. 377, on experiments as evidence.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

ADKINS v. RICHMOND.

[98 Va. 91, 34 S. E. 967.]

CONSTITUTIONAL LAW—PLEADING.—It is not necessary to specially plead the unconstitutionality of a statute or municipal ordinance. The question may be raised by demurrer in the trial court, and the error assigned for the first time in the appellate court.

CONSTITUTIONAL LAW.—JURISDICTION of the appellate court must affirmatively appear from the record, but it does so appear when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the national or state constitution. Any proceeding which necessarily puts their validity in issue, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to give the appellate court jurisdiction.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SALES BY SAMPLE.—A municipal ordinance imposing a license tax upon a resident of the state who solicits orders for the sale of goods by sample, solely for a nonresident owner, and who forwards such orders and receives a commission on sales made, imposes a direct burden upon interstate commerce, and is void as beyond the power of the city to enact. Such ordinance is not a valid exercise of the police power of the state, but is a pure revenue measure.

S. S. P. Patteson, for the appellant.

H. R. Pollard, for the appellee.

⁹² **RIELY, J.** The question involved in this case is the validity of the license tax imposed by the city of Richmond upon the plaintiff in error as a merchandise broker, and for the nonpayment whereof he was prosecuted and fined.

It was objected by the counsel for the city that this court was without jurisdiction of the case, upon the ground that the record does not specially show that the tax was impugned on consti-

tutional grounds. We are not aware of any requirement that it must specially appear in the record by some appropriate plea or other proceeding that the constitutionality of an act of the legislature or an ordinance of a municipal corporation, or of any other matter involved in the litigation, was raised and decided by the lower court in order to call forth the jurisdiction of this court upon that ground. On the contrary, the constitutionality of a law has been repeatedly passed upon on a general demurrer to the pleading in the lower court, and even where the question was raised for the first time in the petition to this court for the writ of error: *Speer v. Commonwealth*, 23 Gratt. 935, 14 Am. Rep. 164; *McCready v. Commonwealth*, 27 Gratt. 985; *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357; *Southern Express Co. v. Walker*, 92 Va. 59, 22 S. E. 809.

The jurisdiction of this court must affirmatively appear from the record, but it does so appear when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the federal or state constitution. Any proceeding which necessarily puts their validity in issue, whether it be by a demurrer, plea, instruction, or otherwise, is sufficient to give this court jurisdiction of the case.

The authorities relied upon by the counsel for the city for his ⁹³ contention were all, with a single exception, cases of the supreme court of the United States, where the rule invoked unquestionably prevails, but that is because that court by express statute has jurisdiction to review a judgment of a state court only when the record shows that some right under the federal constitution or authority of the United States was "specially set up or claimed" and denied by the state court: *Chicago etc. R. Co. v. Chicago*, 164 U. S. 454, 17 Sup. Ct. Rep. 129; *Oxley Stave Co. v. Butler Co.*, 166 U. S. 648, 17 Sup. Ct. Rep. 709; U. S. Rev. Stats., sec. 709.

Upon the trial of the case, the plaintiff in error asked the court to instruct the jury as follows: "If they shall believe from the evidence that Thomas Adkins, trading under the name of Thomas Adkins & Co., only carried on business as a resident sales agent for nonresident principals, and that his employment is exclusively confined to representing nonresident principals in the negotiations of the sales of goods which are in other states, then they must find for the defendant, Adkins"; but

the court refused so to instruct the jury, whereupon a bill of exception was duly taken to its ruling.

While the instruction does not in terms refer to the commerce clause of the federal constitution, it is manifest that the defendant intended by the instruction asked for to invoke its protection, and that the court by refusing to give the instruction decided that the business of a resident sales agent, though limited exclusively to nonresident principals, was not within the protection of article 1, section 8, clause 3, of the constitution of the United States. This was the question presented to and decided by the lower court against the contention of the defendant. The record, therefore, shows affirmatively that the validity of the tax was directly drawn in question, and that this court has jurisdiction of the case.

The evidence in the record shows that the plaintiff in error is a citizen and resident of the city of Richmond, Virginia; that his occupation is soliciting orders in Richmond by personal application, ²⁴ and by the exhibition of samples, solely for nonresident merchants, who are his principals; that his employment is confined exclusively to the negotiation of sales of goods, which are not in the state of Virginia, but in other states; that for the period for which the license tax was assessed against him, and for a long time prior thereto, he had not conducted any other business; that when he secures an order he reports it to his principal, who, if the sale and credit are satisfactory, fills the order by shipping the goods to the resident merchant; that no settlements are made through the agent, but by the resident merchant directly with the agent's nonresident principals, who remit to him the small commission which is his compensation for negotiating the sale; and that he has no storehouse or warehouse, but simply rents a room in the city of Richmond, in which he keeps his samples and conducts his correspondence.

The tax which the defendant refused to pay, and for the nonpayment whereof he was prosecuted and fined, was imposed on him under an ordinance of the city prescribing a license tax for the privilege of prosecuting the business of a broker. The ordinance does not define the term "broker," or explain the sense in which it was used. A commercial broker is defined in the revenue statutes of the state to be, among other things, one who negotiates the sale of merchandise without possession or control of it as commission merchants have of it in their business (Acts 1889-90, c. 244, sec. 64, p. 226); and a "broker," without

special designation, is defined in the text-books to be "an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation, commonly called brokerage": Story on Agency, sec. 28; 4 Am. & Eng. Ency. of Law, 2d ed., 960.

Tested by these definitions, the defendant was conducting the business of a "broker" in the city of Richmond in violation of its ordinance, in that he had not paid, and refused to pay, the license tax required for the privilege of prosecuting such business. ⁹⁵ The question is, therefore, directly presented whether the ordinance under which the tax was assessed against him is, as respects the special and limited business of a broker followed by the defendant, a regulation of interstate commerce, and therefore void on account of its repugnancy to article 1, section 8, clause 3, of the federal constitution.

The supreme court of the United States, which is the authoritative and final arbiter of all questions arising under the constitution of the United States, has repeatedly declared that "no state has the right to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress": *Lyng v. Michigan*, 135 U. S. 165, 10 Sup. Ct. Rep. 725; *Leloup v. Mobile*, 127 U. S. 640, 648, 8 Sup. Ct. Rep. 1380, and cases there cited. It follows, of course, that as a state cannot levy such a tax, a municipal corporation, a creature and agency of the state, cannot do so.

In *Brown v. Maryland*, 12 Wheat. 419, 444, in which a law of the state, requiring an importer to take out a license and pay fifty dollars before he should be permitted to sell a package of imported goods, was declared unconstitutional, Chief Justice Marshall said: "But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but upon the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must see that a tax on the sale of an article which is imported only for sale is a tax on the article itself. . . . So a tax on the oc-

cupation of an importer is, in like manner, a tax on importation. It must ⁹⁶ add to the price of an article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made."

In *Welton v. Missouri*, 91 U. S. 275, 278, the same principle was announced. It was there said by Mr. Justice Field: "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

Again, in *Leloup v. Mobile*, 127 U. S. 640, 645, 8 Sup. Ct. Rep. 1380, Mr. Justice Bradley said: "Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

The principle above declared, that a state has no power to tax the agencies or instruments utilized in negotiating sales of property when it could not tax the property itself, has been broadly stated and uniformly adhered to in all the cases. It is as applicable to brokers as any other agency engaged in interstate commerce. It has been applied by the supreme court in many cases that have come before it. We cannot do more than refer to a few of the leading and most pertinent ones.

In *Robins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, it was decided that a statute of the state of Tennessee imposing a license tax on all drummers and persons offering for sale or selling goods, wares, or merchandise by sample was invalid with ⁹⁷ respect to drummers for firms or individuals doing business in other states, upon the ground that such a tax was a regulation of interstate commerce. It was conceded in the opinion, as had been held in *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, that when goods prior to their sale have been sent from one state into another state to be sold, and the latter state has become the situs of the property, or when, in consequence of their sale,

they have been brought into the latter state and become a part of its general mass of property within the state, they are liable to be taxed by it in the same manner as other property of a similar character, but that to tax the sale of such goods, or the offer to sell them, before they are brought into the state, was a very different thing, and clearly a tax on interstate commerce itself.

In that case the line was clearly drawn between the taxation of goods which have been sent into a state for sale after their arrival in the state and it has become their situs, and their taxation, or the taxation of the agency or instrumentality utilized in their sale and introduction into the state; their sale after their arrival in the state being domestic commerce, and their taxation legitimate, while their sale prior to their introduction into the state is interstate commerce, and their taxation or the taxation of the instrument or means of their introduction is unlawful, because such taxation is a direct burden upon commerce between the states, which, under the constitution, cannot be imposed by the state without the assent of Congress, and the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it shall be absolutely free: *Brennan v. Titusville*, 153 U. S. 289, 303, 14 Sup. Ct. Rep. 829; *Robins v. Shelby County Taxing Dist.*, 120 U. S. 489, 493, 7 Sup. Ct. Rep. 592; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148, 9 Sup. Ct. Rep. 256. This distinction has not been departed from or qualified by any subsequent decision.

In *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1, and in *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. Rep. 256, the principle laid down in *Robins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, was again carefully considered and affirmed.

In *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. Rep. 881, an agent in the city and county of San Francisco, California, for the New York, Lake Erie and Western Railroad Company, a corporation having its principal place of business in the city of Chicago and operating a continuous line of road between Chicago and New York, was convicted and fined for not taking out the license and paying the tax of a railroad agency, as required by an order of the board of supervisors of the said city and county. His duties as such agent consisted in soliciting passenger traffic in that city and county over the said railroad. His employment was confined exclusively to inducing

persons in the state of California to travel from that state, over the line of the road he represented, to the city of New York. It was held that his business was an agency of interstate commerce, and that the order under which he was prosecuted was obnoxious to the commerce clause of the constitution, and therefore invalid. "The object and effect of his soliciting agency," said Mr. Justice Lamar, in delivering the opinion of the court, "were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

In *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810, the court held that the plaintiffs in error, having taken out licenses as general merchandise brokers under the law imposing the tax, whereby they were authorized to do any and all kinds of commission business, were legally liable to pay the privilege tax in question, although their principals happened during the previous ⁹⁹ year, as to the one party, to be wholly nonresident, and as to the other, largely such, as this fact might have been otherwise then and afterward, as their business was not confined to the transactions of nonresidents. "The tax," said Mr. Chief Justice Fuller, "was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and complainants voluntarily subjected themselves thereto in order to do a general business." Distinguishing this case from that of *Robins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, he said: "In the case of *Robins*, the tax was held in effect not to be a tax on *Robins*, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

And again: "No doubt can be entertained of the right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax, the fact that the business done

chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."

In concluding the opinion in that case it was said: "What position they (the complainants) would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record." The particular question thus left open in that case is that which is directly presented in the case at bar.

The decision in the above case was thought by some to be a departure from the principles laid down in the other cases we ¹⁰⁰ have referred to, but in *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. Rep. 829, Mr. Justice Brewer, in delivering the opinion of the court in that case, said: "The case of *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. Rep. 810, is no departure from the rule of decision so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court, and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the state's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the state. Of the power of a state to impose license tax upon such a general business there can be no question."

In the case of *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. Rep. 829, just referred to, the plaintiff in error was convicted of the violation of an ordinance of the city of Titusville, in the state of Pennsylvania, which required all persons canvassing or soliciting orders for goods, books, paintings, etc., to pay a license tax. As agent for his principal, who was a manufacturer of frames and maker of portraits in the city of Chicago, in the state of Illinois, Brennan solicited orders for pictures and picture frames in the city of Titusville, in the state of Pennsylvania, without procuring a license and paying the tax required by the ordinance. It was held, upon a review of the cases to which we have referred and of others, in accordance with the principles established by them, that the license tax imposed on the plaintiff in error was a direct burden on interstate commerce, and was, therefore, beyond the power of the state and void.

The case of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. Rep. 40, was much relied upon as authority for the validity of the tax assessed against the defendant in the case before us. The relief sought in that case was based on an act of Congress entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," and the bill was filed against certain residents of the state of Kansas, who were members of a voluntary unincorporated association known and designated as the Kansas City ¹⁰¹ Livestock Exchange. It was alleged that the members of the exchange had adopted for their government certain articles of association, rules, and by-laws, which were in restraint of trade and commerce between the states. It was held otherwise; but it will be seen running all through the opinion of the court that stress was laid upon the fact that the business of the members was wholly concerned with buying and selling livestock after their arrival at Kansas City, and that the distinction made in the cases heretofore cited between the sale or offer to sell in one state property which is situated in another state, and the sale of property after it has been brought into the state in which the sale is negotiated was kept steadily in view—the one being interstate commerce and subject only to the regulation of Congress, and the other being domestic and subject to legislation by the state. Said Mr. Justice Peckham, in delivering the unanimous opinion of the court: "The selling of an article at its destination which has been sent from another state, while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such services is not, therefore, a combination in restraint of that trade or commerce."

It appeared that the members of the exchange sent solicitors into other states to induce the consignment of stock to them for sale. In reply to the argument that these solicitors were engaged in interstate commerce, the court said: "The position of the solicitors is entirely different from that of drummers who are traveling through the several states for the purpose of getting orders for the purchase of property. It was said in *Robins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, that the negotiations of sales of goods which are in another state for the purpose ¹⁰² of introducing them into

the state in which the negotiation is made is interstate commerce."

"But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own property to agree, when they send it to market for sale, they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them, and account to them for the proceeds thereof. Unlike the drummer who contracts in one state for the sale of goods which are in another, and which are to be thereafter delivered in the state in which the contract is made, the solicitor in this case has no goods or samples of goods, and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business."

The plaintiff in error in the case at bar did not take out license as a general merchandise broker, or in fact any license, because he did not consider that the business he was pursuing was subject to state or municipal taxation; nor was he engaged in a general commission business, but confined his business to selling or offering to sell by sample and personal application, for nonresident principals exclusively, goods belonging to them in another state, for the purpose of introducing them into the state in which the sale is negotiated. His business related wholly to interstate commerce. Upon the reasoning of the cases which have been cited, and in accordance with the principles enunciated in them, it must be held that the license tax imposed by the city upon the plaintiff in error for the privilege of pursuing his said business was a direct burden upon interstate commerce, and was, therefore, beyond the power of the city. The ordinance under which the tax was assessed was not in any manner the exercise of the police power reserved to the states, which, it is well settled, may be exercised by them (*Norfolk etc. Ry.* ¹⁰³ *Co. v. Commonwealth*, 93 Va. 749, 57 Am. St. Rep. 827, 24 S. E. 837, and the numerous cases therein cited and reviewed), but an ordinance adopted simply and wholly for the purpose of raising revenue.

The judgment of the Hustings court must be reversed, the verdict of the jury set aside, and a new trial awarded the plaintiff in error.

INTERSTATE COMMERCE, TAX ON.—A city ordinance requiring an agent for a wholesale book-house situated in another state

to take out a license and pay a license fee when soliciting orders within the city is void as an attempt to regulate commerce between the states: *Bloomington v. Bourland*, 137 Ill. 534, 31 Am. St. Rep. 382, 27 N. E. 602. And a statute levying a tax on the business of selling lightning rods manufactured in one state and sold in another upon orders taken by a traveling salesman is a tax upon interstate commerce: *Talbutt v. State*, 39 Tex. Cr. Rep. 64, 73 Am. St. Rep. 903, 44 S. W. 1091. See, further, *Croy v. Obion County*, 104 Tenn. 525, 78 Am. St. Rep. 931, 58 S. W. 235.

MERCHANTS' BANK v. BALLOU.

[98 Va. 112, 82 S. E. 481.]

TRUSTS AND TRUSTEES—PURCHASER'S NOTICE.—A trustee in a deed to secure bona fide creditors is a purchaser for value, and notice to him is notice to the beneficiaries.

TRUSTS AND TRUSTEES—SUBSTITUTED TRUSTEE.—The relation of principal and agent between the trustee named in a deed to secure creditors and the beneficiaries begins when the transaction is completed. The acceptance of the trustee is presumed until he declines. If he refuses to act and a successor is appointed, the latter is substituted to all the rights and responsibilities of the position as if he had been originally appointed, and the trust in his hands is tainted with all the imperfections that attached to it in the hands of the original trustee.

TRUSTS AND TRUSTEES—NOTICE TO TRUSTEE IS NOTICE TO BENEFICIARY.—A beneficiary in a deed of trust is affected with notice to the trustee, although the latter did not know of the existence of the deed of trust until it was recorded, and then immediately declined to act as trustee.

CONSTITUTIONAL LAW—RETROACTIVE LEGISLATION. A statute is not to be construed so as to give it a retroactive operation, unless there is something on its face putting it beyond a doubt that such was the purpose of the legislature.

CONSTITUTIONAL LAW—RETROACTIVE LEGISLATION—VESTED RIGHTS—JUDGMENTS.—Vested rights in property cannot be disturbed by retroactive legislation, and a judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value, alter its amount, nor diminish or destroy its effect as a lien on land.

CONSTITUTIONAL LAW—VESTED RIGHTS—ALTERATION OF REMEDY.—Although the legislature may modify or change the form of the remedy, provided no substantial right secured by contract is thereby impaired, yet any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is unconstitutional and void.

CONSTITUTIONAL LAW—JUDGMENT LIENS—VESTED RIGHTS.—A judgment lien is a mere remedy for enforcing the judgment. The statute which gives that remedy forms a part of the contract for the lien. Any law which takes away such remedy impairs the obligation of the contract and is unconstitutional and void.

Green & Miller, for the appellant.

W. Leigh, for the appellee.

¹¹³ HARRISON, J. This is an appeal from an interlocutory decree settling the principles of the cause, determining the right of priority between liens, and ordering the sale of certain real estate for the satisfaction of said liens. The appellee contends that the appellant has no standing in this court: 1. Because the appeal was not taken from the interlocutory decree complained of until after there had been a final decree; and 2. Because appellant acquiesced in the decree complained of until it was too late to put the parties in statu quo if the same was reversed.

These questions it is unnecessary to consider, for the reason that the decree complained of must be affirmed, and therefore, whether they are decided for or against appellant, the result is the same.

¹¹⁴ The case presented by the appellant is as follows: On September 21, 1892, C. E. Ballou conveyed to R. W. Lawson, trustee, certain mill property to secure the Bank of South Boston two thousand dollars. This deed was not recorded until April 14, 1893. In the meantime, on April 12, 1893, C. E. Ballou conveyed this same property to J. M. Carrington and H. J. Watkins, trustees, to secure numerous creditors, this last-named deed being recorded on April 13, 1893. Soon thereafter Carrington and Watkins proceeded to execute the deed to them by advertising the property for sale, and on May 17, 1893, an injunction was awarded, stopping the sale, upon the alleged ground that the trustees, Carrington and Watkins, had notice of the deed for the benefit of the appellee, the Bank of South Boston, and that therefore neither they nor the beneficiaries under their deed had acquired priority over appellee by its recordation. The rights of all the creditors were determined in this proceeding, the court holding that the beneficiaries under the deed to Carrington and Watkins took in subordination to the Lawson deed securing the Bank of South Boston.

The testimony of Carrington and Watkins shows that each of them had full and complete knowledge all the time of the Lawson deed, securing the Bank of South Boston, and that they knew of the existence of said deed at the time the deed from Ballou to them was executed, although they did not know of the intention of Ballou to execute the second deed, and did not know it was executed until it was recorded; that on the day it

was recorded they were notified of the fact, and immediately asked if the Bank of South Boston had been protected.

That Carrington and Watkins had full knowledge of the Lawson deed, at the time the deed to them was made and recorded is not denied; that a trustee or trustees in a deed to secure bona fide debts are purchasers for value, and that notice to him or them, or either of them, is notice to the beneficiaries in said deed is not controverted.

¹¹⁵ The contention of appellant is that Carrington and Watkins, being ignorant of the execution and recordation of the deed to them at the time it was executed and recorded, were in no sense agents of the beneficiaries under that deed; that they knew nothing of the claims of the beneficiaries or of the intention of Ballou to make a deed to secure them until the deed had been fully executed and recorded; that they were only purchasers of the legal title, and if they had died, or had declined to accept the trust, notice to them would not have affected the beneficiaries; that their failure to act would have related back to the date of the record of the deed, and their appointment thereunder become void, while the deed would have remained a subsisting security in favor of the beneficiaries; that under such circumstances it would be inequitable to allow the rights of the beneficiaries to be affected by knowledge of the trustees, not acquired in their capacity as agents of the beneficiaries, but as agents of the South Boston Bank, it appearing that the trustees acquired their knowledge of the first deed while officers of the South Boston Bank.

In contemplation of law the relation of principal and agent between the trustee named in a deed and the beneficiaries under it begins when the transaction is completed. The trustee named may not act when informed of his appointment, but his acceptance is presumed until he declines, and when he refuses to act, a successor is appointed who takes his shoes, and is substituted to all the rights and responsibilities of the position as if he had been originally appointed, and the trust in his hands is tainted with all the imperfections that attach to it in the hands of the original trustee. It is not necessary to the validity of the deed that it should be executed by the trustee or the beneficiaries, or even that they, as a matter of fact, should know of its execution. The duties and powers of the trustee are not conferred by the creditor, but arise out of the instrument creating the trust. The rights of the creditor come to him ¹¹⁶ through the trustee, under the provisions of the deed, and so it has been

repeatedly held by this court that the knowledge of the trustee of a prior existing deed is imputed to the creditor. Under the settled law of this state Carrington and Watkins are, under the deed in question, purchasers for value, and under the facts proven they are purchasers with notice, for they were, confessedly, at the time of the execution and recordation of the deed to them fully possessed of the fatal knowledge of the first deed, which made the second deed subordinate to the first.

It is not perceived how the position of Carrington and Watkins as purchasers for value with notice can be affected by the fact that they were not aware of the intention of Ballou to make the second deed or of its recordation when made, nor is it seen how their ignorance of that fact can take this case out of the established principles already adverted to.

Under rule 9, the Bank of South Boston, one of the appellees, assigns as error to its prejudice the action of the court in giving the lien of certain judgments priority over its deed of trust.

This deed was acknowledged before the president of, and a stockholder in, the Bank of South Boston, the beneficiary thereunder, and was therefore not duly recorded as against the judgments in question. It is, however, contended that the defect in its acknowledgment and recordation was cured by an act of assembly, approved March 1, 1894, which provides: "That no acknowledgment heretofore or hereafter taken to any deed or other writing executed by a company for the benefit of a company shall be held to be invalid by reason of said acknowledgment having been taken by a notary public or other officer who, at the time of taking said acknowledgment, was a stockholder or officer in the company which executed said deed or writing, and who was in no otherwise interested in the property conveyed or disposed of by said deed or writing; and the record of any such deed or writing heretofore made shall in all respects be deemed ¹¹⁷ valid, notwithstanding the fact that the notary or other officer was, at the time of such acknowledgment, a stockholder or officer in the company executing said deed or writing or for the benefit of which such deed or writing was executed; provided, said notary or other officer was in no otherwise interested in the property conveyed or disposed of by said deed or writing when said acknowledgment was taken": Acts 1893-94, p. 580.

The contention is that this act was intended as a remedial, curative, and validating statute; that it was in the power of the

legislature to enact it and to make it retroactive, so as to cure any defect in the recordation of the deed in question, and to give it the same force and effect that it would have had if properly recorded in the first instance.

A statute will not be construed so as to give it a retroactive operation unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature. Whether or not the act relied on shows on its face a plain purpose on the part of the legislature to make the imperfect acknowledgments mentioned therein valid from their date, even though it destroyed the rights of judgment creditors whose liens were acquired before the passage of the act, we will not stop here to consider, but will proceed to inquire as to the power of the legislature to enact a law having the retroactive effect claimed for this.

It is unquestionably true that the legislature has power to pass retroactive laws within certain limits, even though such laws may affect a certain class of vested rights: *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663. The opinion of Judge Staples in this case is an elaborate and instructive discussion of the subject under consideration. The reasoning of the learned judge and the authorities cited make it clear that it is not within the proper limits of the law-making power to disturb vested rights of property by retroactive legislation.

There can be no doubt that a judgment is such a vested right ¹¹⁸ of property that the legislature cannot, by a retroactive law, either destroy or diminish its value: *Murphy v. Gaskins*, 28 Gratt. 207, 222; *Ratcliffe v. Anderson*, 31 Gratt. 105, 31 Am. Rep. 716; *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464, 28 N. E. 1040.

In the case last cited the power of the legislature to pass retroactive legislation affecting a judgment is denied, and, in discussing the subject, it is said: "We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become the rights of property. These rights become vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect."

In *Murphy v. Gaskins*, 28 Gratt. 207, an act of the legislature was construed which empowered the court, in which any judgment or decree had been rendered prior to the passage of the act, on motion of the defendant to review such judgment or

decree, and abate the same to the extent of the war interest included therein. The court held the act to be in violation of the state and federal constitution, and in the course of an able opinion, Judge Burks says: "Judgments and decrees for money being contracts of the highest character, of course, and for the reasons before stated, to abate any portion of the interest included in them would necessarily impair their obligation. Moreover, by such judgments and decrees the rights of the parties, in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become vested, and cannot be divested as provided by the act of the general assembly."

It is, however, contended that the effect of the statute in question is not to impair the validity of the judgment, but only to modify the remedy for its enforcement. In other words, that though the judgment itself is a vested right that cannot be impaired or diminished by a retroactive law, yet the lien is not a vested right, but only a remedy provided for enforcing ¹¹⁹ the judgment, which can be taken away by such a law. This position is not tenable. The right to the lien upon the debtor's real estate is, in many cases, the sole inducement to the credit, which constitutes the basis of the judgment. Without the benefit of that lien, guaranteed by the law at the time the judgment is taken, the credit would not have been given.

In Cooley's Constitutional Limitations, fifth edition, page 440, it is said that a right to be vested "must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another," and at page 445 it is said: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In the case of *Edwards v. Kearzey*, 96 U. S. 595, it was held: "The remedy subsisting in a state when and where a contract is made and is to be performed, is a part of the obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution of the United States, and therefore void." Mr. Justice Swaine, in delivering the opinion of the court, says: "It is also the settled doctrine of this court that the laws that subsist at the time and place of making a contract, enter into and form a part of the contract, as if they were expressly referred to or incorporated in its terms. This

rule embraces alike those which affect its validity, construction, discharge, and enforcement."

Judge Christian, in delivering the opinion of the court in the Homestead cases, says: "Nothing can be more material to the obligation than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which are guaranteed by the constitution against invasion. The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into ¹²⁰ and form a part of it, as if they were expressly referred to and incorporated in its terms. It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided that no substantial right secured by the contract is thereby impaired. But any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution": *The Homestead Cases*, 22 Gratt. 288.

If, then, the lien of a judgment be, as contended, a mere remedy for enforcing the judgment, the statute which gives that remedy forms a part of the contract for the lien, and any law which takes away such a remedy impairs the obligation of the contract. When these judgments were obtained, the creditor unquestionably had a clear statutory right to enforce them against the real estate in controversy, and it would seem to be equally clear that such a right is a vested right that cannot be taken away by subsequent legislation. If the constitutional provision relied on can be successfully invoked, as we have seen it can be, to prevent a party from being deprived by a retroactive law of a few dollars of war interest included in his judgment, surely the same constitutional guaranty would avail to save the same party from having his whole judgment destroyed by a retroactive law taking away the lien which alone, as in the case at bar, gives that judgment its life and value. It has been well said:

"You take my house when you do take the prop
That doth sustain my house. You take my life
When you do take the means whereby I live."

For these reasons the decree complained of must be affirmed.

Keith, P., dissents from so much of the foregoing opinion as affirms the decree appealed from on the question raised by cross-appeal under rule 9.

TRUSTS.—A TRUSTEE in a deed to secure an indebtedness due from the grantor to a third person is the agent of both: *Hinton v. Prichard*, 120 N. C. 1, 58 Am. St. Rep. 768, 26 S. E. 627. Appointment of a trustee where the one named in the trust refuses to act: See *Brandon v. Carter*, 110 Mo. 572, 41 Am. St. Rep. 673, 24 S. W. 1035.

RETROACTIVE STATUTE.—A statute should always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature: *Lane's Appeal*, 57 Conn. 182, 14 Am. St. Rep. 94, 17 Atl. 926; *Lawrence v. Louisville*, 96 Ky. 595, 49 Am. St. Rep. 309, 20 S. W. 450. A retroactive statute is valid only when it is remedial and does not impair contracts or divest vested rights. Whenever a statute so far alters a remedy as to render the right scarcely worth pursuing, it must be denied effect: *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613. For retroactive statutes affecting judgments, see *Skinner v. Holt*, 9 S. Dak. 427, 62 Am. St. Rep. 878, 69 N. W. 595; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089; *Thresher v. Atchison*, 117 Cal. 73, 59 Am. St. Rep. 159, 48 Pac. 1020.

NEW YORK, PHILADELPHIA, AND NORFOLK RAILROAD COMPANY v. CROMWELL.

[98 Va. 227, 35 S. E. 444.]

COMMON CARRIERS—LIABILITY FOR CARS OWNED BY ANOTHER.—A railway company cannot escape liability for its failure to provide cars reasonably safe and fit for the conveyance of the particular class of goods it undertakes to carry, by alleging that the cars used for the purpose of its own transit were the property of another, who undertook to insure the fitness of such cars for the purposes of the transportation. In such case the owner of the cars is the agent or servant of the carrying railway company.

Borland & Wilcox, for the appellant.

Heath & Heath, for the appellee.

228 HARRISON, J. E. F. Cromwell instituted this action against the California Fruit Transportation Company and the New York, Philadelphia and Norfolk Railroad Company, alleging a joint liability upon the defendants, and seeking to recover damages alleged to have been sustained by him, in consequence of their failure as common carriers to transmit with due care certain strawberries intrusted to them for the Philadelphia and Boston markets.

It is a well established common-law rule that in all actions of contract the plaintiff must prove his contract against as many persons as he alleged it, and he must recover against all or none.

This principle has been modified by statute: Code, sec. 3395. We are not, however, called upon to decide whether or not the case at bar comes within the provision of the statute, as the parties have taken it from under the operation of the common law by the following agreement: "The court certifies that the foregoing evidence, which is hereby made a part of bill of exceptions, is all that was introduced upon the trial of this cause. And the court further certifies that after the jury had retired they returned into court, and the foreman asked the court whether the jury could find against one of the defendants and not against the other; that before the judge had responded to said inquiry one of the counsel who was engaged in the trial, all the counsel for all parties being then present, stated that by agreement of counsel they could find either against both or one of the defendants or against the plaintiff, and thereupon the judge stated to the jury that by consent of counsel for all parties they could find against both or either defendant or against the plaintiff."

After the jury were informed of this agreement of counsel they brought in a verdict in the following words: "We, the jury, find for the plaintiff against the New York, Philadelphia and Norfolk Railroad Company, and assess his damages against ~~229~~ said defendant at eight hundred and sixteen dollars and sixty-four cents. And we find for the defendant, the California Fruit Transportation Company." The court refused to set this verdict aside, and gave judgment in accordance therewith.

While insisting that neither is liable, the plaintiff in error relies chiefly upon the contention that, as between itself and the California Fruit Transportation Company, the latter is liable. The judgment in favor of the California Fruit Transportation Company has been allowed to pass unchallenged. No writ of error has been asked for or obtained to the judgment in its favor. The plaintiff in error having agreed that the jury might find against either defendant, and the California Fruit Transportation Company not being a party before this court, we are not at liberty to enter upon a consideration of the controversy as to which of the two defendants is primarily liable.

The only question presented by the record before us is as to the liability of the plaintiff in error to the defendant in error. In other words, would the plaintiff in the court below have been entitled to the judgment complained of if the plaintiff in error had been sued alone?

The California Fruit Transportation Company is an Illinois corporation that furnishes what is known as refrigerator-cars. These cars are constructed with ice tanks holding several tons of ice, and are specially used in the transportation of fruits, vegetables and other perishable articles. The plaintiff in error, doubtless in order that it might compete with other railroads similarly equipped, employed these refrigerator-cars for the use of shippers of perishable freight over its line. The strawberries in question were delivered to and put in two of these refrigerator-cars, which were then transferred to the road of the plaintiff in error, where they formed a part of its train. As the strawberries were delivered to the refrigerator-cars, the receipt of that company would be given for the number of crates delivered, each receipt showing on its face that the consignment was subject to ²³⁰ the conditions of the railroad company's bill of lading. There was no bill of lading except that given by the plaintiff in error, and all the freight charges, including the extra charge for the use of the refrigerator-cars, were paid to the plaintiff in error. It was necessary that these cars should be properly refrigerated and kept in that condition until the fruit reached its destination, and it clearly appears that the damage sustained by the defendant in error resulted from a failure to perform that duty.

In the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, a passenger occupying a Pullman car was injured by a berth falling and striking him on the head. He instituted suit against the railroad company, and recovered judgment for ten thousand dollars for the injuries sustained. The defense relied on was that the sleeping-car in which the accident occurred was owned by the Pullman Palace Car Company, a corporation of the state of Illinois; that holders of railroad tickets were entitled to ride in said sleeping-cars, provided they also held sleeping-car tickets; that the Pullman Palace Car Company, and it only, issued tickets for sale entitling passengers to ride in its sleeping-cars, and that such tickets were sold at offices established by the Pullman Car Company; that the Pullman Car Company employed persons to take charge of its cars, and the latter, whilst in use, were in the immediate charge of a conductor and a porter employed by that company; and that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and appurtenances thereto. The lower court instructed, as part of the law of the case, that if the car in which

the accident occurred composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the ²³¹ defendant was liable. This view of the law was upheld by the supreme court, Justice Harlan saying in part: "As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made, if it elected to reserve or exercise no such control or right of inspection from time to time of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were in law the servants and employés of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed was the negligence of the railroad company. The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company and constitute a part of its train, to ²³² evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

Recognizing the higher duty due by common carriers to passengers, we are of opinion that the principles announced by the supreme court in this case are applicable to the case at bar. The employment of a common carrier, whether it be to carry passengers or freight, is a public employment, and the duty he owes as such is a public duty, calling for the exercise of a high degree of care which should not be lightly or negligently performed.

The California Fruit Transportation Company for a consideration furnished its cars to the plaintiff in error. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which they were carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars, or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employes were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator-cars belonged to it.

For these reasons the judgment is affirmed.

A RAILROAD USING CARS OF ANOTHER corporation for transporting freight cannot thereby escape liability: *Railroad v. Dies*, 91 Tenn. 177, 30 Am. St. Rep. 371, 18 S. W. 266.

TREVETT v. PRISON ASSOCIATION.

[98 Va. 332, 36 S. E. 373.]

CORPORATIONS—LIABILITY FOR TORTS.—A voluntary association of persons for benevolent purposes who procure a charter for certain specified purposes, and whose affairs and property are regulated and managed, not by the state, but by its own corporate officials, is a private, and not a public, corporation and is responsible for its torts.

WATERS AND WATERCOURSES—POLLUTION OF STREAM—PRIVIES.—A private corporation which erects privies for the accommodation of a great number of persons, and discharges, through sewers, refuse water, urine and excrement into a natural stream is guilty of a pollution thereof, and a lower riparian owner is entitled to recover for injury inflicted thereby.

NUISANCES.—PRIVIES ARE PRIMA FACIE nuisances, and although necessary and indispensable in connection with property and its use, for the ordinary purposes of habitation, yet if they are built, or allowed to remain, in such a condition as to annoy others in the proper enjoyment of their property, they are nuisances *per se*, and render the person erecting or continuing them liable for all injurious consequences flowing therefrom.

WATERS AND WATERCOURSES—POLLUTION—LIABILITY.—The pollution of the waters of a stream by artificial drainage, which causes sewage to flow into such stream, whether done by a private or municipal corporation, or by an individual, constitutes a nuisance which entitles the lower riparian owner to damages therefor.

WATERS AND WATERCOURSES—POLLUTION—INJUNCTION.—Any use of a natural stream that materially fouls and adulterates the water, or the discharge or deposit therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, is a violation of the rights of the lower proprietor, for which he is entitled to redress, and anything which renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, constitutes a nuisance, which may be restrained by injunction.

A. R. Courtney and H. R. and J. G. Pollard, for the appellant.

R. Stiles and C. V. Meredith, for the appellee.

333 KEITH, P. Plaintiff in error sued the Prison Association of Virginia in an action of trespass on the case, and in his declaration states that he is the owner of a tract of land in the county of Henrico, upon which he and his family reside and carry on a dairy and butter business, in addition to ordinary farming operations, keeping a large number of cows, which renders a supply of pure water essential; that the water for the

use of the stock is supplied by a stream which was pure and uncontaminated and without pollution of any kind, and that the milk and butter from the cows which drank the water was free from any objection or odor, and commanded the highest price on the market; that the defendant in error, the Prison Association of Virginia, became the owner of a certain tract of land upon said stream above the land of the plaintiff, so that the water which passed through the plaintiff's land and was used by his stock and family came through the defendant's land; that the defendant established upon his land a school for the confinement of youthful criminals, known as the "Laurel Industrial School," and erected thereon numerous buildings for their accommodation, and collected and quartered therein several hundred persons, and furnished the buildings with wash-tubs, bath-tubs, urinals and closets, without the consent of the plaintiff and against his protest, and emptied the refuse water, urine, and excrement therefrom into the ³³⁴ stream, and thereby polluted the natural and pure water of the stream on plaintiff's lands below, and, by reason thereof, broke up and destroyed his dairy business, seriously injured the health of his family, impaired the healthfulness of his home, and greatly lessened the value of his property in the public estimation, and reduced its salable value in the market.

The second count is substantially identical with the first, except that it charges the defendant with having erected wash-houses, urinals, and closets, and constructed sewers from them to the stream where it passes through the defendant's lands, and by means of the said contrivances the defendant emptied large quantities of impure water, urine, excrement, and fecal matter, which mingled with the water therein, and by the natural flow of the stream polluted the water of the branch in and upon plaintiff's farm below from which his stock and milch cows had to obtain their daily supply of water to satisfy the demands of nature.

The third count is to the same effect, with the additional allegation that by reason of the impurities carried into it by means of the sewers erected by the defendant, not only was the water contaminated, but that the atmosphere about plaintiff's home became impregnated with microbes of typhoid fever and malaria, and was made in every way injurious to health, and in consequence thereof the healthfulness of the plaintiff's farm was destroyed and that of his family seriously impaired. By

reason of the premises plaintiff claims to have suffered damage to the extent of two thousand dollars, for which he sues.

The defendant demurred to this declaration; the demurrer was sustained, the suit dismissed, and a writ of error was obtained from this court by the plaintiff.

The first objection interposed by defendant in error is that it is not liable to be sued for its torts, and in support of this proposition relies upon the recent case of *Maia v. Directors Eastern State Hospital*, 97 Va. 507, 34 S. E. 617. It was there held that: ³³⁵ "An examination of the statutes creating and continuing this hospital shows that it was created and exists for purely governmental purposes, and is under the exclusive ownership and control of the state. It has no stockholders, no members even, except directors, having no interest in it or its affairs, who are appointed by the governor, by and with the consent of the senate, and are in fact public rather than corporate officials, endowed with a corporate being for a more convenient administration of the duties imposed upon them by law, and are made liable to fines for any failure to perform their duties. The moneys necessary to defray the expenses of maintaining and caring for its inmates is provided by annual appropriations made by the general assembly out of the public treasury, and the manner of keeping and disbursing its funds is prescribed by statute. The directors are required to make quarterly reports to the auditor of public accounts, showing in detail how they have been disbursed, and to report annually to the governor, for the information of the general assembly, the condition of the hospital and the sums received and disbursed by them."

The Prison Association is not such a corporation. It is a voluntary association of individuals, who procured a charter for certain specified objects. It is not controlled by the state, but by its own corporate officials. It makes and enforces its own by-laws and regulations for the management of its affairs and property. It is invested with all powers, rights, and privileges conferred, and made subject to all the responsibilities, regulations and restrictions imposed by the common law and the statutes of this commonwealth upon corporate bodies. It may acquire and hold property, the value of the real estate held by it being limited to one hundred thousand dollars. Its general objects, it may be conceded, are of a benevolent character, as they look to the improvement of the government, discipline and general management of prisons within this state, and the amelioration of the ³³⁶ condition of prisoners, but for its ser-

vices in this behalf it receives a reasonable compensation; and while its officers are required "to make an annual report of their work to the general assembly of Virginia," that does not constitute it a public corporation, and give it immunity from responsibility for its torts.

In 1 Wood on Nuisances, third edition, section 427, it is said: "The right of a riparian owner to have the water of a stream come to him in its natural purity is as well recognized as the right to have it flow to his land in its usual flow and volume. But in reference to this, as with the air, it is not every interference with the water that imparts impurities thereto that is actionable, but only such as impart to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, or such as causes unwholesome or offensive vapors or odors to arise from the water, and thus impairs the comfortable or beneficial enjoyment of property in its vicinity, or such as, while producing no actual sensible effect upon the water, are yet of a character calculated to disgust the senses, such as the deposit of the carcasses of dead animals therein, or the erection of privies over a stream, or any other use calculated to produce nausea or disgust in those using the water for the ordinary purposes of life, or such as impair its value for manufacturing purposes."

The great principle upon which the law, as thus stated, rests is that every man must use his own property so as not to injure that of another. It is true, as urged by counsel for defendant in error, that the operation of this principle is qualified by another maxim founded in natural law, that he who exercises only his own legal rights injures no one. The motive, good or bad, which influenced the action complained of is generally of no importance whatever, for it is well stated by an eminent writer upon this subject that "whatever one has a right to do another can have no right to complain of": Cooley on Torts, sec. 6, p. 337 630. If, therefore, a lawful act is done in a lawful manner, though another may be injured by it, the law affords no remedy. It is *damnum absque injuria*.

It was said by the court in *Merrifield v. Worcester*, 110 Mass. 219, 14 Am. Rep. 592: "Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farmhouses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided and their occupation and use become multifarious, these causes will be rendered more operative and their

effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action."

The wrong complained of in the declaration under consideration differs widely from that pollution of water incident to the causes adverted to in the foregoing quotation. Here it is charged not only that privies were erected for the accommodation of a great number of people, but also that the defendant "emptied refuse water, urine, and excrement therefrom into the stream," and in other counts it is charged that this was done by means of sewers specially constructed for that purpose. Privies are *prima facie* nuisances, and "although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet if they are built or are allowed to remain in such a condition as to annoy others in the proper enjoyment ³³⁸ of their property . . . they are nuisances in fact, and render the person erecting or using them liable for all the injurious consequences flowing therefrom."

"The pollution of the water by artificial drainage which causes sewage to flow into a stream, spring, or well, whether done by a municipal corporation or an individual, constitutes a nuisance which entitles the owner to damages therefor, the rule being that a municipal corporation has no more right to injure the waters of a stream or the premises of an individual than a natural person": Wood on Nuisances, secs. 427, 579.

In *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88, the defendant constructed certain sewers and through them discharged not only surface water, but the sewage from houses and the contents from a large number of water-closets in Thomas creek above plaintiff's land, so as to render its water unfit for use, and covered its banks with filthy and unwholesome sediment. "These and other facts," said the court, "well warranted the conclusion of the trial court that the act of the defendant in thus emptying its sewers constituted an of-

fensive and dangerous nuisance. . . . The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is responsible. . . . The case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which in its natural condition he is entitled, an action against the party, whether it be a natural person or a corporation, who causes that pollution."

The case of *Mayor of Baltimore v. Warren Mfg. Co.*, 59 Md. 96, is instructive. The city of Baltimore asked an injunction against the defendants to restrain them from polluting Gunpowder river, the source of its supply of water for drinking and other purposes. The defendant was an upper riparian proprietor, and the charge against it was that it discharged, or ³²⁹ knowingly suffered or permitted to be discharged, into said stream refuse water from its factory, impregnated with divers injurious ingredients and substances put into the same by the defendant at its factory, whereby the water was rendered less pure and fit for use by man as drinking water. This charge was held to be too vague as to the nature and character of the defilement, but the additional charge that he erected, maintained, and used divers large privies and hogpens at or near said factory, the excrement and filth whereof the defendants caused or willfully suffered and permitted to be discharged into the waters of Gunpowder river, whereby the water of the stream was greatly polluted, was held to be cause for the injunction.

Tracing the law from the time of Lord Coke to more recent times, the court, speaking through Judge Alvey, declares that: "All common-law authorities agree that a riparian owner has the right to the natural stream of water flowing by or through his land in its ordinary, natural state, both as to its quantity and quality, as incident to the right to the land on or through which the watercourse runs. . . . If, therefore," said the court, "the defendants, being upper riparian proprietors, and as such entitled to the ordinary use of the water, including the right to apply it in a reasonable way to purposes of trade and manufacture, are using the water of the stream in an unreasonable manner, and have defiled the same in such manner and to such an extent as to operate an actual invasion of the rights of the complainants, the latter are entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction. . . ."

"What nature and extent of pollution of the stream will call for the active interference of the court is not in all cases easy to define. It is not every impurity imparted to the water, however small in degree, that will be the subject of an injunction. All running streams are, to a certain extent, polluted; and especially are they so when they flow through populous regions of ³⁴⁰ country, and the waters are utilized for mechanical and manufacturing purposes. The washing of the manured and cultivated fields and the natural drainage of the country of necessity bring many impurities to the stream; but these and the like sources of pollution cannot ordinarily be restrained by the court. Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense, as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose."

The case before us measures fully up to the careful statement of the law in the opinion just quoted. If the averments of the declaration before us are true, the water is utterly unfit for its primary uses. It would be disgusting to the senses and injurious to the health. It is a matter of common knowledge that nothing is more susceptible to contaminating influences than milk, and its odor, its taste, and its wholesomeness are alike affected by the conditions to which it may be exposed. It is the principal food of the feeble and the young, and, therefore, to make and keep it pure and free from all contaminating influences is of great importance; but apart from the possible effect upon the health, who would not be nauseated at the idea that the milk he drinks was obtained from cows supplied with water from so foul a ³⁴¹ source as described in this declaration? It does not set out one of those slight interferences the law passes over as too trifling to be considered, but a substantial, and

indeed a destructive, impairment of the value of the water for all of its primary uses.

Defendant in error laid great stress upon the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445. Its authority is much diminished by the fact that the supreme court of Pennsylvania, upon the same case, between the same parties, had reached an opposite conclusion in *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 27 Am. Rep. 711, and by the further fact that in the last case three of the judges dissented, of a court of seven. That was a suit brought by Sanderson and wife against the Pennsylvania Coal Company to recover damages for the pollution by the defendant of a stream of water which flowed through the plaintiff's grounds, by the discharge of water into it from the defendant's mines. The syllabus states, among other things, that: "The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal."

Whether the right of the individual, under like conditions, would with us yield to the public interest, except upon payment of proper compensation, is a question which we need not now decide.

That damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice or negligence, *damnum absque injuria*, as stated in that case, there can be no question, and there is great force in the position of the court that the defendant did nothing to change ³⁴² the character of the water or diminish its purity, save what resulted from the natural use and enjoyment of its own property. Mining coal was a lawful business. It could not be carried on without freeing the mine from the water which percolated into it. All mine water is acidulated and unfit for domestic use. It was pumped out of the mine, and by the force of gravity and the natural conformation of the land it passed into and polluted the stream which flowed through the premises of the plaintiff. As was said by the court: "The defendants having brought nothing onto the land artificially, the water as it poured into Meadow brook is the water which the mine natur-

ally discharged. Its impurity arises from natural, not artificial, causes. A mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharges are necessarily incident to it." It appears, moreover, "that the community in and around Scranton, including the complainant, is supplied with abundant pure water from other sources. There is no complaint as to any injurious effect from this water to the general health; the community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience arising in this way and under such circumstances must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."

We have quoted thus fully from this case, not that we mean to approve, or that we presume to disapprove, the law as stated in that case, but merely to show that it has no very close analogy to the one before us.

The case of *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and that of *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694, were ³⁴² suits against the city of Worcester for polluting a stream by emptying into it the sewerage of the city, and it was held that there can be no recovery against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city, but only so far as it is attributable to the improper construction or unreasonable use of the sewers, or negligence or other fault of the city in the care or management of them.

Passages from the opinions in these two cases may be cited as antagonistic to the views hereinbefore expressed, but we think that the case of *Washburn etc. Co. v. Worcester*, 116 Mass. 458, will solve all the apparent difficulties which may be thus suggested. It there appears that the city of Worcester, in the construction of its waterworks, acted under a statute which made provision "for the assessment, under special proceedings, of damages to all parties whose estates are thereby injured," and the city was, of course, held not to be liable to an action at law or bill in equity for injuries which were the necessary results of the exercise of the powers thus conferred. Said the court: "But if by an excess of the powers granted, or negligence in the mode of carrying out the system legally adopted, or in omitting to take

due precautions to guard against consequences of its operation, a nuisance is created, the city may be liable to indictment in behalf of the public, or to suit by individuals suffering special damage." So that these cases are in harmony with the entire current of authority.

We are of opinion that the judgment of the circuit court must be reversed.

WATERS, POLLUTION OF.—The use of a stream for drainage may, under some circumstances, be reasonable, although the water is thereby rendered unfit for its primary use, but the concentration of filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the stream in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, is unreasonable and creates liability: *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154. See, further, *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167. Pollution of waters from privies: See *People v. Elk River etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 126, 40 Pac. 531; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88.

WATERS, POLLUTION OF.—AN INJUNCTION will lie to restrain the pollution of a stream: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142.

KELLY v. LEHIGH MINING AND MANUFACTURING COMPANY.

[98 Va. 405, 36 S. E. 511.]

EQUITY—JURISDICTION—DELIVERY OF TITLE PAPERS.—A court of equity has jurisdiction to decree the specific delivery of title papers to heirs, devisees, and other persons properly entitled to the custody and possession thereof, if they are wrongfully detained or withheld from them.

EQUITY—JURISDICTION OF, NOTWITHSTANDING STATUTE.—If a court of equity has once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive equity of its jurisdiction, although the statute may furnish a full, complete, and adequate remedy at law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words.

CONVEYANCES—TITLE DEEDS—LIENS.—Under registry laws and statutes of conveyances, the deposit of title deeds creates no lien as against subsequent bona fide purchasers or encumbrancers.

CONVEYANCES—RIGHT TO TITLE DEEDS.—A grantee is not, as matter of law, entitled to demand of his grantor the original muniments of title, under statutes making the records furnish evidence of title, and copies therefrom, equally with the originals, admissible in evidence.

APPELLATE PRACTICE—CONTINUANCE—DISCRETION. Motions for a continuance are addressed to the sound judicial discretion of the trial court, and the appellate court cannot interfere with the ruling made, unless the action of the court was plainly erroneous and an abuse of discretion.

W. S. Mathews and O. M. Vickars, for the appellant.

R. A. Ayres and Bullitt & Kelly, for the appellee.

406 **BUCHANAN, J.** A court of equity has jurisdiction to decree the specific delivery of title papers to heirs at law, devisees, and other persons properly entitled to the custody and possession of the title deeds of their respective estates where they are wrongfully detained or withheld from them. This is an old and well-settled head of equity jurisdiction: 1 Story's Equity Jurisprudence, sec. 703; 1 Pomeroy's Equity Jurisprudence, sec. 185; Snoddy v. Finch, 9 Rich. Eq. 355, 70 Am. Dec. 216.

Chapter 138 of the code, which makes more effective the common-law remedy of detinue, does not affect that jurisdiction, for where courts of equity have once acquired jurisdiction a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words: *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235.

The appellee, the complainant in the court below, based its right to recover the title bonds, agreements, deeds, and tax receipts pertaining to the lands conveyed to it by the appellant upon two grounds: 1. That it is an established principle of law that whoever is entitled to the land has the right to all 407 the title papers affecting it; and 2. That the appellant expressly agreed, in entering into the contract for the sale of the land, that he would turn over to the appellee all the title papers which he had under and by virtue of which he claimed title to the land.

It was conceded that it is an established principle of the common law in England that the party entitled to land had also a right to all title deeds affecting it, and that they passed with the land by the conveyance without being named in it: *Har-*

ington v. Price, 3 Barn. & Adol. 170, 23 Eng. C. L. 83, 84; 3 Sugden on Vendors, c. 11, sec. 4; Williams on Real Property, 434. But it is denied that any such rule exists in this country.

In England there was no general system of registering conveyances of real estate. Possession of the title deeds was an evidence of ownership, and they, or abstracts of them, were shown to the intended purchaser for his examination in negotiations for a sale. When the sale was made they were delivered to the grantee almost as a matter of course in all conveyances of the fee. No transfer of land could be safely made without them, and no one was supposed to have a right to their possession unless he had some claim upon or interest in the land. Whenever a supposed owner offered his estate for sale or mortgage, it was necessary for him to produce his title papers, and their absence from his possession when demanded cast a suspicion upon his title, and put the other party upon inquiry: 3 Pomeroy's Equity Jurisprudence., sec. 1264, note 1; 2 Minor's Institutes, 4th ed., 354. But in this state there is a general system of registering title papers to land, and persons desiring to purchase or secure loans by deeds of trust or mortgages look to the records to ascertain the condition of the supposed owner's title, and seldom, if at all, look to the original title papers, or make inquiry as to the owner's possession of them:

In this state the records furnish evidence of his title, as a ⁴⁰⁸ general rule, and copies therefrom, equally with the originals, are admissible in evidence: Code, sec. 3334.

Under our registry laws and statute of conveyances the deposit of title deeds creates no lien as against a subsequent bona fide purchaser or encumbrancer, as it did in England: Siter v. McClanahan, 2 Gratt. 314; 2 Minor's Institutes, 4th ed., 353, 354.

The reasons for the common-law rule no longer exist here. In this state, and generally in the United States, it is believed it is the general practice for the grantor to retain his own title papers instead of delivering them to his grantee: 1 Greenleaf's Cruise's Digest, tit. 2, c. 1, sec. 39, note; 1 Greenleaf's Evidence, sec. 571, note 3; 3 Washburn on Real Property, sec. 65, p. 375; Eaton v. Campbell, 7 Pick. 10, 12; White v. Hutchings, 40 Ala. 258. 88 Am. Dec. 766.

We are of opinion, therefore, that the common-law rule in question is not in force in this state, and that the grantee is not as a matter of law entitled to demand of his grantor the original muniments of title as he was in England. Where the reason

for a rule of law has ceased, the law itself ought to and does cease: Broom's Legal Maxims, 7th ed., 159.

Upon the calling of the cause at the December term of the court (the first term after the case had been matured at rules), the appellant appeared and filed his answer, in which he denied the existence of the agreement set up in the bill. His answer was excepted to upon the ground that it stated no defense to the case made by the bill. At the same time the appellant moved the court to continue the case, upon the ground that the appellee had not closed its depositions until Monday, the twenty-eighth day of November, 1898, and that he was not notified of that fact until the 29th of that month; that at that time he was engaged as chairman of the board of supervisors of Wise county in the business of said board, and was so engaged until Friday, the 2d of December following, and that he did not have time to prepare ⁴⁰⁰ his defense by taking his depositions which he was advised were material to his defense. The court overruled his motion to continue, and sustained the exception to his answer, and the appellant not desiring to file any other or further answer, the court was of opinion that the appellee was entitled to the relief sought by the bill, and so decreed. The action of the court in overruling the motion to continue the cause and in sustaining the exception to the answer is also assigned as error.

From what has been said in discussing the demurrer to the bill, it is clear that the court erred in sustaining the exception to the answer. It put in issue the agreement set up in the bill, and the exception to it ought to, and doubtless would have been, overruled if the court had not been of the opinion that the appellee was entitled to the possession of the papers sued for as a matter of law in accordance with the English rule. In no other way can the court's action in sustaining the exception be understood. Having this view, the court, of course, overruled the motion to continue, for there was no issue of fact upon which to take proof, and a continuance of the case could have been of no benefit to the appellant.

The appellee insists that as the action of the court in refusing to continue the case was not plainly erroneous, and the decree complained of granted only such relief to the appellee as he was entitled to upon the record as it then stood, treating the exception to the answer as overruled and the answer properly in the case, the decree complained of ought not to be reversed.

It is well settled that every motion for a continuance is addressed to the sound judicial discretion of the court under all

the circumstances of the case, and that an appellate court will not reverse it upon the ground that a continuance was improperly granted or denied, unless its action is plainly erroneous: *Hite v. Commonwealth*, 96 Va. 489, 493, 31 S. E. 895, and authorities cited. If the circuit court had held that the answer was sufficient and then overruled the motion to continue, it would have exercised ⁴¹⁰ that judicial discretion contemplated in such cases, and we are not prepared to say that its action ought to be reversed, although, under the circumstances of the case, the better practice would have been to have continued the case, in order that the appellant might have taken proof to meet the appellee's depositions, taken and closed so recently before the term of court as not to give the appellant time to take his proof before the term commenced.

Without, therefore, intending to infringe in any manner upon the rule which governs this court in considering the action of a trial court upon a motion to continue, where it was necessary in the view the court took of the case to consider and decide the sufficiency of the grounds upon which the motion was based, we are of opinion that the decree appealed from should be reversed in so far as it sustained the exception to the appellant's answer, and the cause be remanded to the circuit court for further proceedings to be had therein not in conflict with the views expressed in this opinion.

TITLE DEEDS—RIGHT TO AND DELIVERY OF.—In America each successive grantor of realty is presumed to give to his grantee only his deed of conveyance, retaining the immediate deed to himself, to rely upon its covenants in case of failure of title. In England the title deeds go with the land to the purchaser: *White v. Hutchings*, 40 Ala. 253, 88 Am. Dec. 766. See, also, *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673. A person entitled to the custody of title deeds to his estate may come into equity and obtain a decree for a specific delivery of them if wrongfully withheld: *Snoddy v. Finch*, 9 Rich. Eq. 355, 70 Am. Dec. 216.

TITLE DEEDS.—A MORTGAGE cannot be created by the deposit of title deeds without a writing, as such mortgage is contrary to the statute of frauds and the recording acts: *Bloomfield State Bank v. Miller*, 55 Neb. 243, 70 Am. St. Rep. 381, 75 N. W. 569. See, also, *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

BURDINE v. BURDINE.

[98 Va. 515, 36 S. E. 992.]

SPECIFIC PERFORMANCE—AGREEMENT TO MAKE WILL.—An agreement to dispose of property in a certain manner by will cannot be specifically enforced in the lifetime of the testator, nor after his death, because it is no longer possible for him to make the will, but equity can do what is equivalent to specific performance, by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with the terms of such agreement, upon the ground that it is charged with a trust in the hands of the heir, devisee, personal representative, or purchaser, with notice of the agreement.

CONTRACTS TO DEVISE LANDS SIGNED BY ONE PARTY—STATUTE OF FRAUDS.—Although an agreement to devise land or bequeath personalty in consideration for personal services to be rendered is signed only by the intended testator, yet if such services have been rendered, the agreement is binding on him, and upon its breach may after his death be enforced against his estate.

SPECIFIC PERFORMANCE OF A UNILATERAL CONTRACT may be enforced against the party signing it, the other requisites for specific performance existing, although the other party did not sign, and there is no mutuality of remedies between them at the time the agreement is made, as the filing of a bill for specific performance by the other party makes the remedy and the obligation mutual.

MASTER AND SERVANT—MISCONDUCT OF SERVANT—CONDONATION OF.—If a master retains a servant in his employment until the end of the term, notwithstanding acts of misconduct on the part of such servant for which he might have been discharged, but was not, such acts must be considered as having been waived or condoned by the master, and he is liable for the compensation which he has agreed to pay for the term of employment.

CONTRACTS.—ILLEGALITY of a contract is never presumed, but must be proved, or must clearly appear upon the face of the contract.

DOWER—HOW MAY BE DEFEATED.—The title of a widow to dower in her husband's lands is liable to be defeated by every subsisting claim or encumbrance existing before her marriage and the inception of her right, and which would have defeated her husband's seisin.

DOWER—HOW DEFEATED—CONTRACT TO SELL LAND. If a man, before marriage, enters into a contract to sell land upon certain terms and conditions, which are thereafter performed, his widow is not entitled to dower in the land, although her husband dies without making a conveyance.

DOWER—HOW DEFEATED—AGREEMENT TO MAKE DEVISE.—If a man, before his marriage, agrees to make a devise to another for a valuable consideration, paid or furnished, his widow, with knowledge of such agreement before her marriage, is not entitled to dower in the land agreed to be devised, although such devise is not made.

White & Penn, Chapman & Gillespie, and Baily, Price & Byars, for the appellant.

E. S. Finney and J. C. Gent, for the appellees.

316 BUCHANAN, J. The record shows that in the year 1883 N. E. Burdine, of Russell county, and two of his former slaves, Roena and Nancy Burdine, entered into a contract evidenced by a writing put upon record, which is in the following words:

"Know all men by these presents, that I, N. E. Burdine, of the county of Russell and state of Virginia, am held and firmly bound in the sum of ten thousand dollars to Roena and Nancy Burdine, colored, of the same county and state.

"The conditions of the above bond are as follows: That I, N. E. Burdine, will make, or cause to be made, a good will to the land that I purchased of Christopher Frick, and reference can be had to said deed, and said land to be divided between the two **317** parties last named, as follows: Roena to have the land running from John Alderson's, east, commencing at a water gap; thence up the bluff through a sugar orchard, and with the top of Cedar Ridge, in the direction of Clinch Mountain, as far as said land extends, and with the lines of same to the lands of Burnett Reynolds, deceased, and J. W. Darton's land to the public road, and with the same to the beginning, except four acres, including the Lastly house, and Nancy Burdine, colored, daughter of Roena, is to have four acres last named, and all of said tract east of Cedar Ridge, and all north of the public road. I also give to Roena Burdine, colored, one-fourth part of the stock, and of the grain and meat, etc., and growing crops that may be on the farm at my death, all the household and kitchen furniture at said farm; I also give to her my bank stock, amounting to one thousand dollars, in the Bank of Abingdon.

"And I give to Nancy Burdine five hundred dollars cash. All this property and cash to pass to the other parties by will at my death; provided, they live and remain with myself and wife during our natural lives, and in the event that Roena Burdine should die first, she is to have the bank stock mentioned above; and provided, further, that she return to my home at once and remain as above stated. I furthermore bind myself to treat both parties with kindness and respectability, they treating me and my wife in like manner.

"In witness whereof, I have hereunto set my hand and seal, this sixth day of April, 1883.

"N. E. BURDINE. [Seal]"

From the close of the Civil War, which resulted in the emancipation of Roena and her daughter Nancy, they had remained with, or in the service of, their former master until a short time

before the said agreement was entered into, when they determined to quit his service and remove to Washington county. The mother did leave, taking with her her own and a part of her ⁵¹⁸ daughter's personal effects, but the latter, on account of the severe illness of her old mistress, had remained and was still in his service when the contract sued on was made. The mother had been a trusted and faithful servant, who for many years had been, on account of the feeble health of Mrs. Burdine, charged with the oversight and management of much of the work connected with the home and the farm, usually looked after by the farmer's wife. The daughter had been brought up in the home of Mr. Burdine and wife, who were childless, and treated more like a child than a servant. Among her duties was that of caring for Mrs. Burdine, who had been for many years subject to some chronic disease.

In a few days after the mother quit Mr. Burdine's service he set about, directly and through others, to secure her return to his home, and to get her and her daughter to continue to live with them, and succeeded in getting them to agree to do so upon the terms stipulated in the writing sued on.

The daughter, after setting out in her bill the agreement with herself and mother, her construction of it, and the circumstances under which it was made, alleged that pursuant to the agreement her mother did at once return to Mr. Burdine's, and they together lived with and served him and his wife until the death of her mother, which was in the year 1885, and that after the death of the latter she continued to live with and serve them until his wife's death, and afterward until his death; that she did not live all the time at the home of Mr. Burdine, for the reason that after the death of her old mistress Mr. Burdine married again, and the second wife, not desiring her to live at the house with them, he moved her to one of his farm houses, where she remained in his employment and rendered him valuable services until his death; that she and her mother having done and performed all they were required to do under the agreement, it became the duty of Mr. Burdine to keep and perform it on his part; that having failed to make a will and give ⁵¹⁹ them the property mentioned, as he had agreed to do, it became the duty of his representative and heirs to deliver and convey the property mentioned in the agreement to the complainant and her mother's heirs and representatives, according to their respective rights, and this she prayed the court would compel them to do.

Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser, with notice of the agreement, as the case may be: 3 Parsons on Contracts, 6th ed., sec. 406; *Hale v. Hale*, 90 Va. 728, 730, 19 S. E. 739.

Several grounds of defense are relied on. The first is that the agreement cannot be specifically enforced, because it is uncertain and indefinite both as to the property the complainant and her mother were to receive and the services they were to render. Whilst its language is not as clear as it might be, we do not think there is any serious difficulty in determining either the duties or the right of the parties under it when considered in the light of the circumstances under which it was made.

The mother and the daughter had for many years, as the record shows, lived with, and performed certain duties for, Mr. Burdine and his wife, which were well known to both parties. The agreement of the servants on their part was that the mother should return to the home of Mr. Burdine, and that she and her daughter "live and remain with" Mr. Burdine and his wife during their natural lives, for the purpose of rendering such services as they had been accustomed to render them. This was³²⁰ manifestly the intention of the parties and the meaning of the agreement. In consideration of such services they were each entitled to receive from Mr. Burdine by devise and bequest certain real and personal property definitely described, but in the event the mother died before Mr. and Mrs. Burdine, she, or rather her estate, was only entitled to receive his stock in the Bank of Abingdon.

The next objection made to the specific enforcement of the agreement is that it is lacking in mutuality, being signed only by Mr. Burdine, and as he could not have it specifically enforced against the other parties, they cannot enforce it against him.

The question of the specific execution of unilateral contracts for the sale of real estate was considered and passed upon by this court in the recent case of *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175, which seems to have been overlooked

by counsel. It was held in that case that specific performance of a unilateral contract will be enforced against the party who signed it, the other requisites for specific performance existing, although the other party did not sign; and there was no mutuality of remedies between them at the time the agreement was made, the filing of the bill by the other party for specific performance making the remedy and the obligation mutual.

In the case of *Cox v. Cox*, 26 Gratt. 310, which was a suit brought by the widow and heirs of a son for the specific execution of a verbal agreement made with his father that, if the son would support him and his wife during their lives, the father would give the son the tract of land on which they lived, the mutuality required in such cases was discussed. Judge Staples, who delivered the opinion of the court, after stating that courts of equity, as a general rule, will not decree in favor of a plaintiff who is himself not bound by the agreement, said: "It is very true that if Joseph Cox had complied with all the terms and conditions upon which the land was to be devised to him, he or his representatives would be entitled to a decree for specific performance. ⁵²¹ The vendor, having received the full consideration, would, of course, be bound to convey." And the same is true in this case, although the complainant and her mother did not sign the agreement sued on, if they complied with the terms and conditions upon which Mr. Burdine agreed to make the devise and bequest to them.

Another objection is that the mother and daughter were both to serve Mr. Burdine and wife during their lives as a condition precedent to the gift of the property, and being a condition precedent, there could be no recovery by either, since the mother died before the condition was complied with.

Whilst the agreement is between the mother and daughter on one side, it does not make the rights of one depend upon the service or the life of the other. The mother, in consideration of her returning to and living with Mr. Burdine and wife, was to receive, if she outlived them, certain definitely described property, but in the event she died before they did, she was only entitled to receive a part of that property, viz., the bank stock. The daughter, for continuing to live with them as long as they lived, would become entitled to certain other property equally well defined. Her right to that property depended, not upon the duration of her mother's life, but upon the performance of the conditions of the agreement on her part.

This brings us to the next objection, viz., that the daughter did not keep and perform the contract.

The answer avers that the daughter not only failed and refused to render the services she owed to Mr. Burdine and wife, and especially to the wife, but became unruly, vicious, aggravating, disobedient, and lewd; that she became the mother of five illegitimate children, thereby disqualifying herself from carrying out the contract on her part if she had desired to do so, and that her conduct became so notoriously bad that Mr. Burdine had to move her away from his mansion house to another part of his premises, two or three miles distant.

523 Such misconduct as is set out in the answer furnished ample grounds for her discharge, and if she had been dismissed therefor, it is clear she could not maintain this suit.

The evidence fully sustains the answer as to some of the acts of misconduct averred, but it does not show that the daughter was discharged for them. On the contrary, it appears that she lived at the home of Mr. Burdine until his wife's death, and afterward until his second marriage. The second wife and the daughter not getting on pleasantly together, the latter was removed to a small house not far from his dwelling-house, near his store, where she lived until he desired to use or lease that house in connection with his storehouse, when he removed her to another house on his farm. After removing her two or three times from one place to another on his farm, during which time she was rendering him more or less service, he finally removed her to a house in the yard at his farm house, where she lived until his death in the year 1897. Whilst living there, where Mr. Burdine kept a bed and furniture and spent from one-third to one-half of his time, the daughter managed his cows, kept the keys of his granary and crib, and looked generally after things around the house. During the last two years of his life, being old and feeble and unwell, and no other person living in the farm house, he slept much of his time in the daughter's house, and was waited on and cared for by her.

It is not shown that there was any contract between them during all this period other than that which the daughter is seeking to have enforced, or that either she or Mr. Burdine treated that agreement as at an end. Having retained her in his service until the expiration of the term, notwithstanding her acts of misconduct for which she might have been discharged, but was not, they must be considered as having been waived or condoned by him: Wood on Master and Servant, sec. 123.

It is also urged in argument that the agreement cannot be enforced because it is founded upon an immoral consideration—⁵²³ namely, for the future illicit association and cohabitation between Mr. Burdine and Roena, the mother.

There is evidence showing that improper relations had existed between Mr. Burdine and the mother, and that he had admitted that he was the father of the daughter though not of her other children. There is also evidence tending to show that one reason why the mother left his house when she went to Washington county was that she might lead a different life. It does not appear, however, either from the agreement or otherwise that the consideration for the agreement was the future illicit cohabitation of the parties. It purports to be for services on her part which were lawful, and which were rendered.

"In order," says Mr. Wood, in his work on Master and Servant, second edition, section 204, "to render a contract void for illegality, it must necessarily involve the breach of a statute or of the common law, or be contra bonos mores; and when it may or may not be so, according to the circumstances, it will be presumed that it only involves the doing of a lawful and proper act, and will be sustained, as illegality is never presumed, but must be proved, or must clearly appear upon the face of the contract": *Trovinger v. McBurney*, 5 Cow. 253; *Smith v. Du Bose*, 78 Ga. 413, 6 Am. St. Rep. 260, 3 S. E. 309. The record does not show that the contract under consideration was made for immoral purposes.

We are of opinion that the daughter is entitled to the property which Mr. Burdine agreed to devise and bequeath her, and that the personal representative of the mother (who was made a party defendant to this suit by an amended bill) is entitled to the bank stock mentioned in the agreement of April 6, 1883.

We are further of opinion that the widow of N. E. Burdine is not entitled to dower in the land which he agreed to devise to the complainant. The agreement which bound him to make the devise was of record when the second marriage occurred. The rights which his widow acquired by that marriage were subordinate to those of the complainant. The title of a widow to dower ⁵²⁴ in her husband's land, being derived through the husband, is liable to be defeated by every subsisting claim or encumbrance existing before the inception of her right, and which would have defeated the husband's seisin: 1 *Scribner on Dower*, 591, 594; 4 *Kent's Commentaries*, 50; 2 *Minor's Institutes*, 4th ed., 146, 147; 1 *Washburn on Real Property*, 163.

It is well settled that if a man before marriage enters into a contract for the sale of land, upon certain terms and conditions, and the terms and conditions are performed, his widow is not entitled to dower in the land, although the husband dies without making a conveyance. This is upon the principle that the husband is regarded in equity as a trustee for the purchaser: *Chapman v. Chapman*, 92 Va. 537, 53 Am. St. Rep. 823, 24 N. E. 225; 1 Lomax's Digest, c. 2, secs. 13, 14, side p. 101. And the same rule ought to apply when the husband has bound himself to make a devise to another for a valuable consideration, paid or furnished, and he has failed to do so, at least in a case where the wife had knowledge of the agreement before marriage.

As no final decree can be entered by this court because of the consent decree for renting out the lands during the pendency of the suit, the decree of the circuit court dismissing the complainant's bill will be reversed, and the cause remanded to be proceeded with in conformity to the views expressed in this opinion.

SPECIFIC PERFORMANCE OF A CONTRACT to make a will in consideration of personal services may be decreed: *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

SPECIFIC PERFORMANCE.—IT IS NOT NECESSARY, to authorize the specific performance of a contract, that it should be signed by the party seeking to enforce it: *McPherson v. Fargo*, 10 S. Dak. 611, 66 Am. St. Rep. 723, 74 N. W. 1057. Nor is the plaintiff's right to specific performance dependent on the defendant's right to that remedy: *Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614, 20 Atl. 792; *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253. Compare the note to *Grimmer v. Carlton*, 27 Am. St. Rep. 173.

DOWER—ANTENUPTIAL CONVEYANCE.—A deed executed the day previous to the grantor's marriage is not in fraud of his wife's inchoate right of dower, if she, with knowledge thereof, accepts a life estate in other property of his equal to her dower and homestead interests: *Clark v. Clark*, 183 Ill. 448, 75 Am. St. Rep. 115, 56 N. E. 82; and where lands are sold by an unmarried man, his subsequent marriage does not create any right to dower therein, though they are not conveyed to the purchaser till after the marriage: *Chapman v. Chapman*, 92 Va. 537, 53 Am. St. Rep. 823, 24 N. E. 225.

SCOTT v. MOORE.

[98 Va. 668, 37 S. E. 342.]

DEEDS—MISDESCRIPTION.—A commissioner's deed conveying more than the former owner is entitled to is void as to the excess, and the grantee takes only what the former owner had title to.

DEEDS—APPURTENANCES—WHAT PASS AS.—When property is conveyed, everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as an incident to the principal thing or as a part of it, provided such privileges or quasi easements are necessary for the reasonable and convenient enjoyment of the granted premises.

DEEDS—EASEMENTS PASSING BY GRANT.—If an owner of adjoining lots sells them at the same time to different purchasers, each grant carries all the apparent and continuous easements which are necessary for the reasonable use of the property granted, and which have been, or are at the time of the grant, used by the grantor for the benefit of such property.

DEEDS—EASEMENT PASSING BY.—A purchaser takes land with reference to the condition of the premises at the time of the grant, and if such condition clearly shows that an alleyway over the premises is and has been used, and is intended to be used, by the owner or occupant of the adjoining land, the purchaser takes subject to such use.

EASEMENTS AND SERVITUDES adopted by the owner of lands, which are plainly visible or notorious, and from the character of which it may be fairly presumed that he intended their preservation as necessary to the convenient enjoyment of his property, become, when the lands are divided and pass into other hands, permanent appurtenances thereto, and neither the owner of the dominant or of the servient portions of the land has power to adversely interfere with their proper use and enjoyment.

EASEMENTS—ABANDONMENT—FAILURE TO USE AN ALLEYWAY, unaccompanied by proof of an intention on the part of the owner of the premises, or of some act done or permitted which is inconsistent with the future enjoyment of the right, and which clearly indicates an intention to abandon the easement, is not sufficient to establish an abandonment thereof.

EASEMENTS—WAYS—ABANDONMENT.—A right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is an intentional abandonment of the former way.

EASEMENTS—ABANDONMENT BY ACTS IN PAIS.—A person entitled to a right of way or other easement in land may abandon and extinguish it by acts in pais, without deed or other writing, and a cessation of the use, coupled with any act indicative of an intention to abandon the right, has the same effect as an express release of the easement, without any reference whatever as to time.

EASEMENTS.—TO ESTABLISH AN ESTOPPEL against an easement, it is necessary that the representation or conduct relied upon should have been intended to influence the other party to act. If there is no such intent, the estoppel is not established.

Scott & Buchanan and J. H. Ingram, for the appellant.

Christian & Christian and H. W. Anderson, for the appellee.

670 CARDWELL, J. In the year 1835 James Caskie purchased one hundred and thirty feet of land in the city of Richmond, fronting on Franklin street, between Fourth and Fifth streets. Upon it he built four houses now known as Nos. 400, 402, 404, and 406 east Franklin. No. 400 east Franklin is situated on the northeast corner of Franklin and Fourth streets, and No. 402 is just east of No. 400. At the time of the construction of these houses James Caskie laid off in the rear of No. 400, and separated from it by a brick stable and brick wall, and alleyway four feet six inches wide, connecting premises No. 402 with Fourth street. This alleyway entered No. 402 at the point where the ancient wall referred to in James Caskie's will as the division line between the two properties, Nos. 400 and 402 ended, to wit, four feet six inches from the southern line of the adjoining property, thus leaving an opening of this dimension from the alleyway into premises No. 402. There was a gateway at each end of the alley—that is, at its Fourth street entrance, and its entrance into premises No. 402. This alleyway was used by the occupants and owners of No. 402 at pleasure up to and until the obstruction of the same complained of in this suit. It seems to have been of no use to the owners or occupants of No. 400, as this property had a private alleyway of its own connecting its rear premises with Fourth street. In the bed of the alleyway connecting premises No. 402 with Fourth street James Caskie constructed a sewer for the drainage of No. 402 and the two properties on the east thereof owned by him, which sewer was, and is now, the only means of drainage from No. 402. The owner of No. 400 had no occasion to use this drainage as, that property being situated immediately on the corner of Franklin and Fourth streets, the sewerage connections were direct with the public sewer in Fourth street.

James Caskie died in the year 1866, and by will left No. **671** 400 east Franklin, with appurtenances, to trustees for the benefit of the family of his son, James A. Caskie; No. 402 east Franklin, with appurtenances, to his son, John S. Caskie; and Nos. 404 and 406 east Franklin to other children of the testator, but with these two last-named properties we are not concerned.

John S. Caskie died in the year 1869, and left the property, No. 402 east Franklin, to his daughter, Mrs. Dr. Burfoot. Mrs.

Burfoot owned this property up to 1891, when she conveyed it to R. Carter Scott, who in 1895 conveyed it to his wife, Mrs. L. M. B. Scott, the complainant in this suit.

The property, No. 400 east Franklin, was held by trustees up to 1870, when it was conveyed by Isham Keith, substituted trustee, to John G. Moffet. Moffet died about the year 1884, and his estate was settled under the supervision of the chancery court of the city of Richmond, in the suit of Moffet v. Moffet. In that suit No. 400 east Franklin was sold under decree of court by special commissioners, and purchased by Thomas J. Moore for his wife, Mrs. Julia G. Moore, the defendant to this suit. This sale was confirmed on October 17, 1885, and deed executed to Mrs. Moore in 1887. The special commissioners had a plat of No. 400 east Franklin made prior to its sale or its second advertisement—there being no sale at the first offering of the property—which plat shows the property as fronting thirty-two feet four inches on Franklin, and running back on a parallel line with Fourth street one hundred and eighteen feet four inches, which brings this latter line to the end of the brick wall referred to in James Caskie's will as the dividing line between Nos. 400 and 402, and to the south line of the alleyway in rear of No. 400. The second advertisement of this property by the special commissioners described it as being of the dimensions given in the plat referred to, which did not include the contested alleyway; but when the commissioners came to make a deed to Mrs. Moore, the purchaser, from some cause not explained, they described ⁶⁷² the property as running back on a line parallel to Fourth street one hundred and twenty-three feet six inches, which includes the contested alleyway. The decree of the court under which the commissioners acted described the property only in general terms, as "fronting twenty-seven feet, more or less, on Franklin street, and being the same real estate conveyed to John G. Moffet from Isham Keith, substituted trustee, dated," etc.; and the deed from Keith, trustee, to Moffet described it as "that certain house, lot, and appurtenances on the northeast corner of Franklin and Fourth streets, in the city of Richmond, with metes and bounds as set forth in the will of James Caskie, deceased, to which reference is made," etc.

The fourth clause of the will of James Caskie describes the property, now No. 400, as "the house and lot and appurtenances at the northeast corner of Franklin and Fourth streets," and the seventh clause describes the property, now No. 402, as

"the house and lot and appurtenances on Franklin street, adjoining that heretofore given . . . (i. e., No. 400); and the wall separating the two lots in the rear, extending in a straight line to Franklin street, shall be the division line between them."

In 1885 Mrs. Moore, before the sale of the property No. 400 east Franklin to her had been confirmed, and before she had paid the purchase money therefor, moved on the premises, and had the gates at either end of the alleyway, now in dispute, nailed up, and later—some time in 1889—she or her husband had the ancient dividing wall spoken of in James Caskie's will extended across the alley, by adding thereto a wall of much narrower width; but all this was done without the consent or knowledge of Mrs. Burfoot, the owner, or her tenant, of premises No. 402. During the summer of 1898 Mrs. Moore commenced excavations in the rear of her premises for the purpose of building thereon flats fronting on Fourth street, and in addition to the dimensions of the lot she owned, it became apparent that it was her intention to occupy this now ^{etc} disputed alleyway, and to permanently obstruct it with a brick building, the foundation of which would necessarily involve, as is contended, a destruction of the drainage of the rear of premises No. 402, its sewerage connection with Fourth street, and the lateral support of the ancient dividing wall between the two premises. Whereupon Mrs. Scott, the present owner of premises No. 402, filed her bill in the law and equity court of Richmond city, setting forth substantially the facts above stated, and praying for an injunction restraining the defendant, Mrs. Moore, from further prosecuting her said work, so far as it interfered with the alleyway and sewer connection of premises No. 402 with Fourth street, and the lateral support of the dividing wall referred to in James Caskie's will, which injunction was granted.

The judge of the law and equity court being so situated that he did not deem it proper for him to hear and decide the case, requested Judge Wellford, of the circuit court of the city of Richmond, to preside, and upon the hearing of the cause upon the bill and answer and exhibits therewith, together with the depositions taken on behalf of both complainant and defendant, Judge Wellford refused to dissolve the injunction. Whereupon the defendant's counsel took the deposition of James A. Caskie on behalf of the defendant, and objection having been made to Judge Wellford's presiding further in the case, and he, for reasons satisfactory to himself, declining to do so, it was, by order

of the judge of the law and equity court, transferred to the chancery court of the city of Richmond, and the judge of the latter court, upon a hearing of the cause, dissolved the injunction and dismissed complainant's bill. From this decree an appeal to this court was granted.

The first contention of appellant is that "it was error for the judge of the circuit court of the city of Richmond, sitting, as far as this case is concerned, as the judge of the law and equity court, to allow himself to be ousted of jurisdiction ⁶⁷⁴ of the case after having jurisdiction, as provided for by statute, and after having virtually decided the case in favor of appellant." As the decree is to be reversed upon other grounds, we deem it unnecessary to comment upon this assignment of error.

The remaining assignment of error brings up the case for consideration upon its merits.

The questions to be determined are: 1. What title, if any, did appellee, Mrs. Moore, acquire to the alleyway in question when she became the owner of premises No. 400 east Franklin? 2. Did an easement of a right of way over this alley ever exist in favor of the owner of premises No. 402? And 3. If it existed has it been lost by abandonment?

Much reliance is placed by appellee upon her deed from the special commissioners of the court in the suit of Moffet v. Moffet, in which, as we have seen, No. 400 is conveyed to her as running back on a line parallel to Fourth street one hundred and twenty-three feet four inches, which takes in the alleyway; but, as we have also seen, there is nothing in the decree under which these commissioners were acting to authorize that description of the property. There is nothing in the deed from Keith, substituted trustee, to John G. Moffet, whose property the commissioners were conveying, to authorize it. That description was at variance with the plat of No. 400 which the commissioners had made, and which was filed in the suit in which appellee made her purchase. The advertisement made by these commissioners after they had the plat of the property made, and under which appellee made her purchase, described the property as running back from Franklin street one hundred and eighteen feet four inches, which left out the alleyway in dispute. Considering the manner in which the testator, James Caskie, constructed the two premises, Nos. 400 and 402, the uses made of the alleyway up to the time of his death, and the language of his will disposing of them to his children, there is nothing to justify the conclusion that the alleyway was to pass ⁶⁷⁵ exclusively

to the devisee of No. 400. Therefore, the commissioners, grantors of appellee, exceeded their authority in executing the deed describing the property so as to include this alleyway, and their grantee only took such title to the alleyway as existed in the estate of John G. Moffet, deceased.

It is a firmly established principle, concurred in, it may be said, by the text-writers and adjudicated cases, that where there is a grant of some estate described generally, and not by specific metes and bounds, as a mill or dwelling-house, all parts or parcels of the mill or dwelling-house pass with the mill or dwelling-house as a portion of the same, although such portions may extend into, over, and under the remaining land of the grantor. The privileges pass rather as a part and parcel of the land conveyed, and so would equally pass, though there were used in the deed no such words as "with all easements," or "with all privileges and appurtenances." This is upon the principle that when property is conveyed everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as incident to the principal thing or as a part of it; that is, where such privileges or quasi easements are necessary for the reasonable and convenient enjoyment of the granted premises: *Goddard on Easements*, 120, 121; *Elliott v. Rhett*, 5 Rich. 405, 57 Am. Dec. 750, and notes; *Washburn on Easements*, 85, 86.

It was said by Story, J., in *Whitney v. Olney*, 3 Mason, 280, Fed. Cas. No. 17,595: "The good sense of the doctrine on this subject is that under the grant of a thing whatever is parcel of it or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee": 2 *Minor's Institutes*, 4th ed., 27.

In *Washburn on Easements*, after reviewing a number of authorities on the subject of easements, on pages 102, 103, it is said: "Although it might, perhaps, be difficult to embody the leading doctrine of the foregoing cases into any general proposition, ⁴⁷⁶ it would seem that in case of a division of an estate consisting of two or more heritages, whether an ease or convenience which may have been used in favor of one in or over the other by the common owner of both shall become attached to the one or charged upon the other, in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend, when there are no words limiting or defining what is intended to be embraced in such deed or partition, upon whether such easement is necessary for the reasonable enjoyment of the part of such heritage as claims it as an ap-

purtenance. It must be reasonably necessary to the enjoyment of the part which claims it, and where that is not the case, it requires descriptive words of grant or reservation in the deed to create an easement in favor of one part of a heritage over another."

Again, on page 105, it is said: "It may be considered as settled law in England (1) that when the owner of two adjoining lots sells one, he does not reserve impliedly for the benefit of the other any easements except those of strict necessity, such as a way of necessity; but (2) that he does impliedly grant to the grantee all those continuous and apparent easements which are necessary for the reasonable use of the property granted, and which have been, or are at the time of the grant, used by the owner of the entirety for the benefit of the part granted; (3) if he sells both lots at the same time, each grant carries all the apparent and continuous easements which are necessary for the reasonable use of the property granted, and which have been or are at the time of the grant used by the grantor for the benefit of such property." It is under this latter clause mainly that the case we have in hand comes.

The decisions upon the subject of implied grant in the different states of the Union are numerous and often conflicting, but the more recent of them support, it may be said, the ⁶⁷⁷ rule deduced from the general principles of the law sustained by the English decisions discussed by Washburn just referred to.

In *Elliott v. Rhett*, 5 Rich. 405, 7 Am. Dec. 750, the supreme court of South Carolina said: "Apart from all considerations of time there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements which have in fact been used by the owner during its unity, though they have no legal existence as easements, as well as of all those necessary easements without which the enjoyment of the several portions could not be fully had."

The opinion of the supreme court of Maryland by Miller, J., in *Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404, is an able and elaborate discussion of the American and English cases as to the law applicable to cases where the severance of a heritage is by simultaneous conveyance to separate persons, and it is said: "All these continuous or apparent easements, or, in other words, all these easements which are necessary to a reasonable enjoyment of the premises granted, and which have been, or are at the time of the grant, used by the owner of the entirety for the

benefit of the part granted will pass to the grantee under the grant."

The rule of law there laid down is identical with that stated in *Elliott v. Rhett*, 5 Rich. 405, 7 Am. Dec. 750, except that in the last-named case the opinion goes further and adds: "As well as of all those necessary easements without which the enjoyment of the several portions could not be fully had."

Grant that a temporary provision or arrangement made for the benefit of an entire estate will not constitute the degree of necessity and permanency required to burden a property with a continuance of the same when divided or separated by conveyance to different parties, as was held in *Frances' Appeal*, 96 Pa. St. 200, cited for appellee, still the manner of constructing two contiguous premises by the owner of both, with reference ^{ers} to the easement of a right of way and sewerage connection, the right of way being well defined by a brick wall on one side of the alley and a brick wall and the wall of a brick building on the other, forming the alleyway leading from the rear of one of the premises to the nearest street in which the main sewerage of that part of the city is laid, will go very far in determining the character of the easement, whether it be continuous and permanent or only temporary. Hence, what was clearly the intention and purpose of the owner of the entire property is to be considered as of much importance in determining whether or not an easement which he has established for the benefit of one portion of the property over, through, or under the other is to be regarded as continuous and permanent or a necessary easement without which the enjoyment of the several portions could not be fully had: *Davis v. Sear*, L. R. 7 Eq. 427; *Huttemeir v. Albro*, 18 N. Y. 48; 2 Bosw. 546; *Vorhees v. Burchard*, 55 N. Y. 98; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Thompson v. Minor*, 30 Iowa, 386; *Washburn on Easements*, 103.

In *Scott v. Beutel*, 23 Gratt. 1, cited by appellee, one of two adjoining lots owned by the same parties was sold at auction under the decree of court. At the time of the sale nothing was said of an easement running from the unsold lot through the one sold for carrying water from the former to a culvert in the street, and such easement was not to be seen on the lot sold, and was not known to the purchaser; hence, it was held that the purchaser was entitled to have his lot free of the easement. This decision was upon the ground that the easement

or servitude which was claimed was not obvious or apparent to view: 2 Minor's Institutes, 4th ed., 27.

After reviewing the case of *Scott v. Beutel*, 23 Gratt. 1, at length, Bouldin, J., in *Hardy v. McCullough*, 23 Gratt. 259, 260, said: "We understand from the decision that the question whether an easement or servitude will be created or pass as incident to or ⁶⁷⁰ part of the property granted is a matter of contract, and must, of course, depend on the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. When not thus expressed, the construction will be controlled by the use and condition of the property at the time of the sale and certain implications and presumptions of law arising thereon."

In that case the decision was adverse to the claim of an easement made by appellant Hardy under a deed from one Wills, but the court said: "Had the deed to Wills, under which the appellant claims, conveyed the wharf property with its appurtenances to Wills, with general warranty with no reference to the terms and conditions on which he was to use the dock, we are of opinion, on the facts proved in the cause, that the right to use the dock in connection with and for the benefit of the wharf as it has been openly used by the grantors would have passed to the grantee by implication of law as an easement, or as a part of the property granted." The facts in that case were: Southgate and others were owners of two wharfs and a small dock between, fronting on Elizabeth river at Norfolk, which dock was used in connection with both wharves. In 1851 they sold to Wills the eastern wharf with its appurtenances, with general warranty, making the logging on the west line of the dock the boundary; and in their deed they covenant to allow Wills to have the common use with themselves or their tenants of the said dock for the purpose of landing goods on his wharf from vessels or boats which might enter therein, as long as the dock and adjoining premises were owned by them, or until they might choose to fill up the dock, Wills, in consideration thereof, undertaking to clear out from time to time the dock at his own expense. In March, 1854, they (Southgate and associates) sold the other wharf to Ball.

Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165, is also relied on by appellee. In that case "Woodlawn" and "Fairfield," separated only by ⁶⁸⁰ a public road, were owned by Anthony Walke, Sr., who drained the former by ditches through the latter to a river. In 1811 he deeded "Woodlawn" to his son A.,

who conveyed it to appellee Baxter. In 1820 he devised "Fairfield" to his son D., who conveyed it to appellant Sanderlin. The deed and will were silent about draining. In 1878 appellant undertook to stop up the ditches, and appellee obtained an injunction. When "Woodlawn" was granted, the ditches were open and visible, and except for a brief time had been used continuously to drain it. It could be drained in no other way except by heavy expenditure. They were necessary to a proper enjoyment of the premises. This court, in an opinion by Burks, J., affirmed the decree of the lower court perpetuating the injunction. He says that the doctrine of grant of an easement by implication under circumstances such as were shown in that case seemed now to be well settled. He briefly reviews the authorities other than our own decisions, recites the decisions of this court, and quotes from the opinion of Bouldin, J., in *Hardy v. McCullough*, 23 Gratt. 259, italicizing that portion of it which says that "when the intention of the parties is not expressed in the contract, the construction will be controlled by the use and condition of the property at the time of the sale, and certain implications and presumptions of law arising thereon," and holds that upon the facts in the case, although the right to the use of the ditches as an easement was not given in express terms by the deed of the elder Walke to his son, under whom appellee Baxter claimed, it passed with the land granted as an incident.

That case is relied on to support a technical distinction which has in some cases been recognized between what are called "apparent and continuous easements" and "discontinuous easements," the former being defined to be those constant and visible, and the latter, those which are only visible in their exercise—the contention being that an easement of way is not an apparent and continuous easement, and therefore cannot be presumed to pass as incident to grant.

The opinion also quotes with approval from *Washburn on Easements*, supra, that in case of a division of an estate, consisting of two or more heritages, whether an ease or a convenience which may have been used in favor of one in or over the other by the common owner of both shall become attached to the one or charged upon the other in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in such deed or partition, upon whether such easement is necessary for the reason—

able enjoyment of the part of such heritage as claims it as an appurtenance. It must be reasonably necessary to the enjoyment of the part which claims it, and where that is not the case, it requires descriptive words of grant or reservation in the deed to create an easement in favor of one part of a heritage over another. In other words, whether the easement claimed will pass as an incident to the property granted or acquired in a partition of the heritage will depend upon the facts and circumstances of the particular case.

Mr. Minor (2 Minor's Institutes, 27) classes ways as an easement as to which a grant is implied upon severance, and says that the mode of severance does not appear to affect the doctrine in question; that it is believed to arise not only in cases of direct conveyance, but also when the ownership is severed by partition, by devise, or by any other mode of alienation.

We see nothing in the decisions of this court cited by appellee that is opposed to the view we take of this case. The evidence shows that the alleyway in controversy was, as we have observed, clearly defined and in use at the time of the death of the testator, James Caskie, and also at the time of the sale of No. 400 to appellee; its northern boundary being ^{ess} a wall or fence separating it from the adjoining property; its southern line being a stable and wall separating it clearly from appellee's property. It had a gateway at its Fourth street entrance and at its entrance into appellant's property, No. 402. The condition of the premises showed plainly and unmistakably that the alleyway had been used, was in use, and was intended for use to the owner or occupant of No. 402, and appellee is presumed to have contracted in reference to the condition of the property at the time of her purchase: French v. Williams, 82 Va. 462.

We cannot conceive that the physical evidence could have been plainer, more open, more obvious, than that this alleyway was constructed and used for the benefit of premises No. 402. Premises Nos. 400 and 402 east Franklin stood at the time of appellee's purchase as James Caskie constructed them. He arranged and adapted these premises the one to the other. He constructed the well-defined alleyway in the rear of No. 400, connecting Fourth street with premises No. 402, upon the rear of which he built a woodhouse, a coalhouse, a servants' house, and other houses, situating them with reference to the alleyway, so as to make the most direct and convenient means of supplying the premises with fuel or for disposing of garbage, or the

passing in or out of servants. He drained the premises through and under the alleyway into Fourth street, and it has so remained ever since. No. 400 was constructed and arranged with an alley into Fourth street and a sewerage connection directly with Fourth street, thus pointing out plainly that the alley in the rear of No. 400 and the sewerage connection laid therein were intended as an easement and for the use of No. 402, and they were so used at the will or convenience of the owner or tenants of premises No. 402 until the interference therewith complained of in this suit.

James Caskie, grandson of the testator, James Caskie, states that he remembers this alleyway as far back as 1860, and reiterates, ^{ess} as does Mrs. Burfoot, that it was used only for the benefit of No. 402.

Norman V. Randolph occupied No. 402 from 1873 to 1878, and testifies that the alleyway was used exclusively for the benefit of those premises; that he used the alleyway through which to bring fuel, etc.; that the two gates were kept locked, and he carried the keys in his pocket, and that Mr. Moffet, who during that period owned No. 400, made no use of the alleyway for any purpose whatever.

Mrs. Doran states that she has known of the existence of this alleyway for the past thirty years, having lived on the property immediately adjoining the northern line of the alley, and that the alley was used exclusively for the benefit of No. 402 east Franklin. She also describes how the alley was separated from No. 400, as above stated, and as does Mr. Randolph and other witnesses.

Mrs. Moore, appellee, herself testifies as to the existence of the private alleyway on her premises, connecting them immediately with Fourth street, and that her stable, which formed a part of the wall separating the alleyway from her premises, opened into Fourth street, and was entered from that street. True, she says that she did not know of the alleyway in question as an easement to premises No. 402, yet she admits that immediately upon moving into No. 400, which she did as soon as she contracted to buy the property, she had the gates at either end of the alley nailed, and later extended the brick wall across the alley, and further admits that this was all done without the consent of anyone or without notice to anyone.

"Servitudes adopted by the owner of lands which are plainly visible or notorious, and from the character of which it may be fairly presumed that he intended their preservation as neces-

sary to the convenient enjoyment of his property, become, when lands are divided and pass into other hands, permanent appurtenances thereto, and neither owner of the dominant or servient ⁶⁸⁴ portions of the land have power to adversely interfere with their proper use and enjoyment": Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Eby v. Elder, 122 Pa. St. 342, 5 Atl. 423; Stein v. Dahm, 96 Ala. 485, 11 South. 597.

We are of opinion that when appellee acquired title to premises No. 400 east Franklin she took it subject to a right of way and easement in the alleyway attached to premises No. 402, and extending to Fourth street in rear of premises No. 400, and of this easement No. 400 is the servient and No. 402 the dominant estate.

Has that right in the appellant as owner of No. 402 been surrendered or lost? Mrs. Burfoot, who inherited No. 402 from her father, John S. Caskie, and who owned it from 1869 to 1891, testifies that she had no knowledge of the closing up of the alley until the institution of this suit; that she gave no consent for the alley to be closed up, nor acquiesced in its being closed, and that had she known of appellee's purpose of obstructing the alleyway, she would not have allowed it. Mrs. Burfoot never resided upon No. 402, but rented it to tenants. In 1891 she, without knowledge that any attempt had been made to close the alleyway, conveyed the property to R. Carter Scott, who afterward, in 1895, conveyed it to appellant. Mrs. Burfoot further testifies that she considered that the alley went with the house conveyed to Scott, as she had always claimed the alley, and her right had never been questioned.

Mr. Scott, upon taking possession of the property and finding the alley closed, immediately interviewed Mr. Hill, the agent of Mrs. Burfoot, who sold him the property, and Mr. Hill stated to him that the alley belonged to the property. He further states that he had an interview with Dr. Thomas J. Moore, husband of appellee, and who acted as her agent in the purchase of No. 400, who stated to him (Scott) that premises No. 402 were entitled to the use of the alley, and that he would remove ⁶⁸⁵ the obstructions whenever he (Scott) or his wife, the appellant, desired it. Appellant testifies also as to the conversation with Dr. Moore.

While this evidence may not be competent to prove a contract between appellant and appellee made with appellee's husband, as her agent, with reference to the alley and an easement therein, it is competent in rebuttal of the statements of ap-

pellee and of the other proof relied on by her that appellant or those under whom she claims had surrendered her right of an easement in the alleyway, i. e., abandoned it.

Appellee relies strenuously upon the testimony of James A. Caskie (for whose family's benefit James Caskie, deceased, left in trust premises No. 400), to show: 1. That the alleyway was never used or regarded as an easement attached to No. 402; and 2. If such was ever the case, the right had been surrendered or lost before Mrs. Burfoot parted with the property. This witness removed from Richmond to the county of Fauquier in 1868, where he has since resided. He never lived upon either Nos. 400 or 402, but when he lived in Richmond, he was a frequent visitor to his brother, John S. Caskie, who owned and occupied No. 402. The sum and substance of his testimony is that in conversations witness had with his own family they considered that the alleyway belonged exclusively to No. 400, and that the use of it by his brother in connection with No. 402 was a matter of courtesy to his brother. But witness admits that his brother John used the alleyway as he chose; that his right to do so was not questioned, and that he (witness) never had any talk whatever with his brother either about No. 400 or the alleyway. He further admits that the alleyway was not used in connection with No. 400, and that the wood and coal for those premises were brought from Fourth street through another way provided by his father in the construction of premises No. 400, and was unable to say with any degree of certainty ~~was~~ that there was any opening from No. 400 into the alleyway in question.

We shall not attempt to review in detail the authorities cited by appellee's counsel and ably presented in support of her contention that the easement attached to No. 402 in the alleyway in question has been surrendered or lost, as we do not think that they are applicable to the proof in this case.

The burden of proof was upon appellee to show an abandonment on the part of appellant or her husband, or Mrs. Burfoot, under whom appellant claims, of the right of an easement in the alleyway, and her proof fails to show it.

It appears that one or more of the tenants of No. 402 for a short term did not use the alleyway in question, and it may be conceded that appellant or her immediate grantor, during the period from the latter's purchase from Mrs. Burfoot to the time when appellee disclosed her purpose to destroy it, did not use the alleyway; still this, unaccompanied by proof of an in-

tention on the part of the owner of the premises, or of some act done or permitted which is inconsistent with the future enjoyment of the right, and which clearly indicated an intention to abandon the easement, is not sufficient: *Simmons v. Cloonan*, 81 N. Y. 557; *Ballard v. Butter*, 30 Me. 94; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411; 4 American and English Decisions in Equity, 340, 341.

"There are many acts of abandonment short of a nonuser for twenty years which, if done by the owner of the dominant tenement and acquiesced in by that of the servient, may amount to a surrender of such an easement, provided such acts of abandonment have been done with such intention": *Stein v. Dahm*, 96 Ala. 485, 11 South. 597, and authorities there cited.

"A right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is an intentional abandonment of the former way": *Jamaica Pond Aqueduct Co. v. Chandler*, 121 Mass. 3; *Eddy v. Chace*, 140 Mass. 471, 5 N. E. 306; *Goddard* ⁶⁸⁷ on Easements, 467; 3 Kent's Commentaries, 449; 1 Am. & Eng. Ency. of Law, 2d ed., 1, and authorities there cited.

A party entitled to a right of way or other mere easement in land may abandon and extinguish such right by acts in pais, and without deed or other writing; and a cessation of the use, coupled with any act indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time: *Vogeler v. Geiss*, 51 Md. 408.

There are a great number of like decisions of courts of last resort, and they rest upon the equitable doctrine of estoppel, too well understood and established to require a discussion of it here. In order to establish an estoppel, it is necessary that the representation or conduct relied upon should have been intended to influence the other party to act; and if there was no such intent, the estoppel is not made out: 4 American and English Decisions in Equity, 276, 340, 341.

There is nothing whatever in the evidence in this case of any act on the part of appellant, or on the part of those under whom she claims, from which it could be reasonably inferred that she or they intended to surrender any right to the easement in the alleyway in question. It cannot be said that she or they have done any act or permitted any act to be done whereby appellee has been led into a change of her condition, for

as soon as it became apparent that she intended to destroy the alleyway and the sewerage connection through it, this suit was brought, and the injunction obtained restraining her from proceeding with the work.

Upon the whole case, we are of opinion that the decree appealed from is erroneous, and it will therefore be reversed and annulled, and this court will enter such decree as the lower court should have entered, perpetuating the injunction awarded in the case, with costs to appellant.

Appurtenances.

"Appurtenances," in the legal acceptance of the word, mean one thing belonging to another as principal and passing as incident to the principal thing, but do not include personal property which is totally disconnected with the demised premises: *Scheidt v. Belz*, 4 Ill. App. 431. An appurtenance is a thing used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant: *Jarvis v. Seele Milling Co.*, 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044.

A conveyance of premises with the appurtenances is common form, and "this being the usual form of conveyance of real estate, we are unable to see how personal property can be embraced therein. Appurtenances are things belonging to another thing as principal, and which pass as incident to the principal thing. The term, as used in conveyances, passes nothing but the land and such things as belong thereto, and are part of the realty": *Ottumwa Woollen Mills Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719-721.

Nothing passes by the word "appurtenance" or as appurtenances, except such incorporeal easements or rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere convenience is not sufficient to thus create such a right or easement: *Ogden v. Jennings*, 62 N. Y. 526; *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531; *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. 580; *Root v. Wadhams*, 107 N. Y. 394, 14 N. E. 281; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 331, 52 N. W. 439; *Humphreys v. McKissock*, 140 U. S. 314, 11 Sup. Ct. Rep. 779.

The word "appurtenances" in the habendum clause of a deed cannot be construed to convey anything except what is legally appurtenant to the lands in the hands of the grantor, and therefore will not be extended to convey an easement in the land of another, which, by reason of not having ripened into a legal right, has not become legally attached to the premises conveyed, unless accompanied by proper words describing it and showing the intention of the grantor to pass it: *Swazey v. Brooks*, 34 Vt. 451. A grantee of land does not acquire, as appurtenances, easements in adjacent land

which at the time of the grant, to the knowledge of all of the parties, belonged to a third party, and which the grantor had no power to convey, and the mere fact that such adjacent land is thereafter acquired by the grantor does not render him liable to the owner of the dominant land for the subsequent destruction of appliances upon such adjacent land, in use at the time of the grant for the purposes of the easement, in an action brought against him to compel the restoration of easements appurtenant to the grant: *Spencer v. Kilmer*, 151 N. Y. 390, 45 N. E. 865.

Pass Without Special Mention.—It is a well-known and reasonable rule, in construing a grant, that when a thing is granted, all the means to attain it, and all the fruits and effects of it are granted also without special mention: *Rood v. New York etc. R. R. Co.*, 18 Barb. 80. Appurtenances will pass by a deed or grant of conveyance, even if the word "appurtenances," or a similar expression, is not used in the conveyance: *Jarvis v. Seele Milling Co.*, 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044; *Berry v. Billings*, 44 Me. 416, 69 Am. Dec. 107. Property conveyed passes with all the incidents then rightfully belonging to it, or actually or usually enjoyed with it at the time of the conveyance, so far as they are necessary to the full benefit and perfect enjoyment of the property, without any specification of them: *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489, 495. The principal thing draws to all its incidents and appurtenances, and upon a transfer of the principal thing they will pass with it though not specially mentioned: *Morgan v. Mason*, 20 Ohio, 401, 55 Am. Dec. 464.

If an easement is apparent and continuous, it passes by deed "with the appurtenances" without specially giving the right to use the easement: *International Pottery Co. v. Richardson* (N. J. L.), 43 Atl. 692; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369; *Elizabethtown etc. R. R. Co. v. Killen*, 21 Ky. Law Rep. 122, 50 S. W. 1108.

The incidents which thus pass as appurtenant must be open and visible, from which fact the knowledge of their existence by the grantor is a natural inference, but such knowledge may be shown otherwise than by the grantor's actual use: *Simmons v. Cloonan*, 81 N. Y. 558. But an easement which is not apparent, of which the grantor has not made use, and of which he has no information, does not pass in his deed by implication: *Hyde Park Light Co. v. Brown*, 172 Ill. 829, 50 N. E. 127; *Ingals v. Plamondon*, 75 Ill. 118. And a right not connected with the enjoyment or use of a parcel of land cannot be annexed as an incident to that land so as to become appurtenant to it by implication: *Linthicum v. Ray*, 9 Wall. 241.

What Passes.—If mill property is granted, an easement in other lands of the grantor, used in the enjoyment of the property, will pass by the grant as an appurtenance: *Jarvis v. Seele Milling Co.*, 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044. If the owner of a tract of land conveys to another a distinct portion containing a

fish pond then in use, with apparent artificial facilities for supplying it with water from a source on the portion of the tract retained by the vendor essential to a reasonable enjoyment of the property conveyed, there passes as an appurtenance the right to continue taking the water and to maintain the appliances in use for such purposes: *Spencer v. Kilmer*, 151 N. Y. 391, 45 N. E. 865.

The grant of a stone quarry with the appurtenances thereunto belonging carries with it the right to use, as of necessity, a switch track constructed by the grantor over other land owned by him, and used by him to carry stone to a railroad: *Kamer v. Bryant*, 20 Ky. Law Rep. 840, 46 S. W. 14.

The rule is that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee. Thus the sale of a bridge across a certain stream, "together with the tollhouse, stables, and outhouses of every description," and "all the privileges and appurtenances appertaining or in anywise belonging to said bridge," passes the land upon which the bridge rests, and the other buildings are erected: *Sparks v. Hess*, 15 Cal. 186.

If a mortgage of an electric light plant describes the property mortgaged as certain real estate situate in a certain county with the structures thereon, together with all machinery and fixtures appertaining or belonging thereto, a line of electric poles situated in another county, but connected with the electric light plant in the first county, form a part of the realty, and are covered by the mortgage as an appurtenance: *Dreisbach v. Ross*, 195 Pa. St. 278, 45 Atl. 722. If a vendee purchases a lot marked on a plat, duly recorded, of city property, the plat being referred to for a description of the premises conveyed by a reasonable construction of the vendor's intention, the vendee is entitled to all the appurtenant advantages which the plat proclaims to exist, so far as the land embraced is owned by the vendor, and if no express reservation is made in an absolute deed to lots sold, and platted streets are appurtenant thereto, it must be held that the vendee intended the streets to be public, and not private, ways: *Denver v. Clements*, 3 Colo. 472.

Within the right of way conveyed by deed to a railroad company for the purpose of constructing, maintaining, and operating thereon a railroad track with all its necessary appurtenances, and for all uses and purposes connected with the construction, repair, maintenance, and complete operation of such railroad, everything essential and convenient to the safe and proper operation of the road may rightfully and reasonably be expected to be placed by the company including switches and turntables: *Illinois Central R. R. Co. v. Anderson*, 73 Ill. App. 621.

A conveyance of land by necessary legal consequence carries the buildings thereon as appurtenances thereto, without special mention

In the deed: *Isbam v. Morgan*, 9 Conn. 374, 23 Am. Dec. 361; *Morgan v. Mason*, 20 Ohio, 401, 55 Am. Dec. 464; *Wilson v. Hunter*, 14 Wis 688, 80 Am. Dec. 795. A conveyance of a mill, with the appurtenances, carries with it so much land as is necessary for the free use and enjoyment of the mill: *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Blake v. Clark*, 6 Me. 496; *Esty v. Baker*, 48 Me. 495; *Forbush v. Lombard*, 13 Met. 100. And if mill property is granted, an easement in other lands of the grantor, used in the enjoyment of the property will pass by the grant as an appurtenance: *Jarvis v. Seele Milling Co.*, 173 Ill. 192, 64 Am. St. Rep. 107, 50 N. E. 1044. A deed to a mill with the appurtenances conveys all the easements appurtenant to the mill and the land upon which it stands and necessary to the enjoyment thereof, as they existed at the time of the execution of the conveyance: *Bowling v. Burton*, 101 N. C. 170, 7 S. E. 701. A conveyance of a store and bakery conveys the land on which they stand and so much more as may be necessary for their ordinary use: *Pottkamp v. Russ* (Cal.), 31 Pac. 1121.

Ways.—It is well settled that a right of way or other easement may pass by a conveyance as appurtenant to the land conveyed: *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804, 52 N. E. 585. Thus, when the owner of an entire estate makes one part of it visibly dependent for means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes a way of necessity and an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises: *National Exchange Bank v. Cunningham*, 46 Ohio St. 575, 22 N. E. 924; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804, 52 N. E. 585. And the same rule prevails although no way or means of access has been created, because if that portion of the land granted is inaccessible except by passing over the other, or by trespassing on the lands of another, a grant of a right of way by necessity, and as appurtenant to the land granted, is presumed: *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; *Barnard v. Lloyd*, 85 Cal. 181, 24 Pac. 658; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632; *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421, 27 N. E. 344. The grant of the minerals in a tract of land carries by implication, as appurtenant thereto, a right of way over the land to mine and remove the minerals: *Pearne v. Coal Creek etc. Co.*, 90 Tenn. 619, 18 S. W. 402. And the grant of a tunnel right through a specific piece of ground "together with all and singular the appurtenances thereto belonging," carries with it by implication every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right: *Scheel v. Alhambra Min. Co.*, 79 Fed. 821.

If a person owns a building consisting of more than one story, connected by a stairway, and he sells an upper story to another person, the right to use such stairway, that being the only means of access to such upper story, passes to the purchaser as an easement appurtenant to the premises conveyed: *National Exchange Bank v. Cunningham*, 46 Ohio St. 575, 22 N. E. 924; *Pierce v. Cleland*, 133 Pa. St. 189, 19 Atl. 352.

Land cannot be, and will not pass as, appurtenant to land: *Van O'Linda v. Lathrop*, 21 Pick. 292, 32 Am. Dec. 261; *Hall v. Benner*, 1 Penr. & W. 402, 21 Am. Dec. 394; *Otis v. Smith*, 9 Pick. 238; *Helme v. Guy*, 2 Murph. 341. Hence, if a conveyance is of a piece of land by defined boundaries, with appurtenances, other land not included in such boundaries does not pass as appurtenant to the grant. All that can be claimed, as embraced in the word "appurtenances" are easements and servitudes necessary to the enjoyment of the land conveyed: *Woodhull v. Rosenthal*, 61 N. Y. 382; *Rivas v. Solary*, 18 Fla. 122; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Ogden v. Jennins*, 66 Barb. 801. Land does not pass as a mere appurtenant to other land, and consequently no portion of a highway adjoining upon land conveyed is conveyed with the land, unless the instrument of conveyance can, by reasonable construction, be made to include it: *Cole v. Haynes*, 22 Vt. 588. But it has been held that land may pass as an appurtenant to land if such appears to have been the intention of the parties to the deed. Such intention is to be collected from the deed itself, the situation of the parties, the apparent motives leading to the contract, and the contemporaneous construction placed upon it: *Case of Private Road*, 1 Ashm. 417. A wharf is not land within the rule that land cannot pass as appurtenant to land, and tide flats may pass as appurtenant to a wharf, if necessary to its use: *Brown v. Carkeek*, 14 Wash. 443, 44 Pac. 887.

Water Rights connected with land generally pass with a conveyance of the land as an appurtenance thereto, with or without the use of the word "appurtenance" in the conveyance. Thus, a water right connected with, and necessary to the use of, a mill passes under a conveyance of the mill as an appurtenance thereto: *Pickering v. Stapler*, 5 Serg. & R. 107, 9 Am. Dec. 336; *Gibson v. Brockway*, 8 N. H. 465, 31 Am. Dec. 200. Thus if a raceway running from the mill conveyed over other land of the grantor, which has been used for a number of years, is necessary for the convenient use of the mill, a right to an uninterrupted flow of the water in such raceway passes as appurtenant to the mill: *New Ipswich Factory v. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346. A deed of a mill and dam with the appurtenances passes not only the dam at the mill, but also an easement in a reservoir dam, half a mile above, owned by the grantor of the mill and the lower dam, and for many years used in conjunction with them, although the

grantor did not own all the adjoining land between the dams: *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377, and note 381-386.

A water right in a natural stream may be appurtenant to real estate and by a conveyance of the land with appurtenances the purchaser also takes such water right: *Simmons v. Cloonan*, 81 N. Y. 557; *Hall v. Sterling etc. Ry. Co.*, 148 N. Y. 432, 42 N. E. 1056; *Alta Land etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645. The right to water for irrigation, when appurtenant to land, passes by a grant of the land, though not specially mentioned: *Turner v. Cole*, 31 Or. 154, 49 Pac. 971. If the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be practically valueless, and constitutes, perhaps, the only inducement for the purchase, such water right will pass by the deed, with or without the word "appurtenances": *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.

A water right acquired and used for a beneficial and necessary purpose in connection with realty is an appurtenance thereto, and as such passes with a conveyance of the land unless expressly reserved from the grant: *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Whitehurst v. McDonald*, 52 Fed. 633. If the owner of land receives water acquired by appropriation by means of a ditch passing through the land of another, and flowing therefrom over adjoining land, and such water is necessary to a proper use of his land, and by such means has been actually brought and used upon the land for years, such water right is appurtenant to the land, and passes by a deed conveying such land, even though the ditch terminates at a long distance therefrom, and the right to take the water therefrom across the adjacent land was partly without right and partly conferred by revocable license: *Crooker v. Benton*, 93 Cal. 365, 28 Pac. 953. And a conveyance of land, with the appurtenances, conveys the grantor's interest in a ditch passing through the land which has been constructed under an agreement with the owner of the water right, without proceedings in eminent domain, whereby he is to be permitted to construct the ditch without payment of damages in consideration of the use by the grantor of sufficient of the water to irrigate his land below the ditch, and which is necessary to its cultivation, although such use of the water is not described in express terms in the deed: *Sloan v. Glancy*, 19 Mont. 70, 47 Pac. 334.

If the owner of land through which a stream flows divides the land into two parts, and grants away one of them, the grantee takes by implication and as appurtenant a right to the water necessary for the reasonable enjoyment of the part granted, and if the parties have each used one-half of the water of such stream without interference, such grantee and his successors acquire a right to take and

use one-half of the water of the stream: *Smith v. Corbit*, 116 Cal. 537, 48 Pac. 725.

Personalty, if prepared and fitted to be used with real estate, and necessary for its beneficial use, becomes a part thereof, and if on the premises at the time of the conveyance, passes as an appurtenance by deed of such realty. Thus, a conveyance of a sawmill and appurtenances conveys the mill chains, dogs, and bars, in their proper places in the mill at the time of the execution of the deed: *Farrar v. Stackpole*, 6 Greenl. 154, 19 Am. Dec. 201. Manure lying about a barn passes to the grantee of the land as an incident thereto or an appurtenance thereto, unless it is expressly reserved in the deed: *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Witherbee v. Ellison*, 19 Vt. 379; *Goodrich v. Jones*, 2 Hill, 142. It has been held that when the land is conveyed, all manure made in the ordinary course of carrying on the farm, and which is upon the premises at the time of the sale and conveyance, passes to the grantee as an incident of the land conveyed, unless there is a reservation in the deed. And it makes no difference whether it is in the field, or in the yard, or in heaps at stable windows, or under cover: *Connor v. Coffin*, 22 N. H. 538; *Plumer v. Plumer*, 30 N. H. 558. On the other hand, it has been decided that when manure lies upon the soil where it is dropped in the first instance, it is part of the realty, and passes as appurtenant thereto. If severed from the soil, gathered up and secured for use elsewhere, it is a mere personal chattel, and does not pass with a conveyance of the land. Hence, a sale and conveyance of a farm would not, under this ruling, carry with it an accumulation of manure removed from the barnyard, and piled in a heap on the farm, and previously sold by the vendor but not yet removed. Having been sold previously to the sale and conveyance of the farm, it is not at the time legally appurtenant thereto: *French v. Freeman*, 43 Vt. 93. Rails belonging to a fence, or hauled on the premises with the intention of erecting a fence, or timber for a building, though not erected, but lying loose upon the lands, and in no manner attached thereto, constitute a part of the realty and will pass by deed thereof as appurtenances: *McLaughlin v. Johnson*, 46 Ill. 103; *Goodrich v. Jones*, 2 Hill, 142; *Ripley v. Paige*, 12 Vt. 353. It has been held, however, contrary to the above rule that rails piled upon the land at the time of the conveyance by warranty deed with appurtenances are personalty and do not pass by the deed, unless by agreement of the parties: *Harris v. Scovel*, 85 Mich. 82, 48 N. W. 173; *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. 500.

If real estate conveyed is illegally connected with a public sewer through a drain existing on the land of another private owner, the right to use such sewer does not pass as appurtenant to the land conveyed: *Bumstead v. Cook*, 169 Mass. 410, 61 Am. St. Rep. 293, 48 N. E. 707.

One entire railroad cannot pass by the word "appurtenance" to another railroad, any more than one tract of land would pass as appurtenant to another: *Philadelphia v. Philadelphia etc. R. R. Co.*, 58 Pa. St. 253.

Light and Air.—A conveyance of land upon which is a building depending for its light and air on windows therein which overlook adjoining land of the grantor does not include any right of light and air through such windows, unless expressly granted thereby. Such right or easement does not pass as an appurtenance, and in the absence of express grant, the adjoining owner may totally obstruct such windows: *Keiper v. Klein*, 51 Ind. 316; *Kennedy v. Burman*, 120 Cal. 488, 52 Pac. 843; *Hazlett v. Powell*, 30 Pa. St. 296.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

ZINN v. DAWSON.

[47 W. Va. 45, 34 S. E. 784.]

JUDGMENTS—SETOFF AGAINST—MERE INSOLVENCY
of a judgment creditor does not of itself justify an injunction against the enforcement of a judgment at law, in order to let in a setoff which might have been pleaded in the action in which such judgment was recovered.

JUDGMENTS—SETOFF AGAINST—EQUITABLE RELIEF.
A person who allows a judgment by default to go against him, having a judgment at that time against the plaintiff which he might have pleaded as a setoff, cannot, on the ground of mistake, as to the time when the case was to be tried, together with the insolvency of the plaintiff, obtain the benefit of such setoff in equity.

JUDGMENTS—SETOFF AGAINST—REMEDY.—If a person, at the time judgment is obtained against him, holds judgments against the plaintiff, he is not compelled to plead them as a setoff in such action, but may, after notice and on motion have his judgments set off against plaintiff's judgment, and having thus a plain, adequate, and complete remedy at law he cannot come into equity for relief.

P. J. Crogan, for the appellants.

J. A. Brown and J. W. Mason, for the appellees.

⁴⁵ **ENGLISH, J.** Harrison Zinn, Lorenzo M. Zinn, Milford C. Gibson, and T. F. Lanham filed their bill in the circuit court of Preston county against M. W. Dawson and Lloyd C. Shaffer, sheriff of said county, praying an injunction to restrain said Shaffer and Dawson from collecting certain executions set forth and described in their bill in favor of said Dawson. ⁴⁶ It appears from the pleadings in this cause that the defendant Dawson, at the March term, 1897, of said court obtained a judgment by default against the plaintiffs Harrison Zinn and

Lorenzo M. Zinn for seventy-nine dollars and forty-five cents, and a judgment against the plaintiffs Harrison Zinn, M. C. Gibson, and T. F. Lanham for one hundred and one dollars and forty-one cents, and twenty-four dollars and sixty-five cents costs, and that executions were issued and levied on both of said judgments; that the plaintiffs obtained an injunction restraining Dawson from collecting his said judgments, or either of them, alleging that Dawson was insolvent, and claiming that the plaintiffs Zinn and Gibson were the owners, by assignment, of three judgments upon which executions had been issued, then in the hands of the officers, which judgments were against said Dawson; praying that their judgments might be set off against the judgments of Dawson, and alleging that they would have been filed and pleaded as an offset at the time said judgments were obtained by Dawson but for the fact that they mistook the time when the matters upon which said judgments are founded were to be passed upon and decided on the law side of the court. An injunction was granted as prayed for and an amended bill filed, in which the plaintiffs, among other things, alleged that they had asked the sheriff to balance the said executions, which he declined to do. The defendant Dawson demurred to the plaintiffs' bills, and filed his answer thereto, denying every material allegation, and the plaintiffs filed a special replication. On September 11, 1897, said demurrer was overruled, and the motion to dissolve the injunction also overruled, the court holding that the plaintiffs were entitled to have their executions set off and balanced against the executions in favor of the defendants, and referred the case to a commissioner, who made report, which was excepted to by the defendants. In the final decree the court confirmed the commissioner's report, balanced and set off the plaintiff's executions against the defendants, and also deducted the costs of this chancery suit from the defendants' judgments, and found a balance of fourteen dollars and seven cents due Dawson, for which execution was directed to issue in his favor. From this decree said Dawson obtained this appeal.

47 Can we sustain the action of the court in overruling the defendants' demurrer to the plaintiffs' bill and amended bill? Looking at the case thereby presented, were the defendants entitled to the relief prayed for in a court of equity? One of the grounds relied on by the plaintiffs in support of their prayer for an injunction and general relief is that the defendant Dawson is notoriously insolvent, and that he intended to

schedule against the executions then in the hands of the sheriff in their favor. This question was presented to this court in the case of *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16, where it was held that "the mere insolvency of a judgment creditor will not of itself justify an injunction against the enforcement of a judgment at law, in order to let in a setoff which might have been pleaded at law at the time such judgment was recovered." The plaintiffs in this case seek to excuse themselves for their failure to make their defense at law by filing and proving their setoff by alleging that they were mistaken as to the time when the matters upon which said Dawson's judgments are founded were passed upon by the circuit court on the common-law side. This fact, however, would not confer jurisdiction on a court of equity, as will be seen by reference to the case of *Shields v. McClung*, 6 W. Va. 79, a case in which Haymond, president, reviews the authorities bearing upon the point, and holds that "a party to whom a day and opportunity have been allowed to make his defense against a demand set up against him in a court of law, but who has wholly failed to avail himself of them, will not be entertained in a court of chancery on a bill seeking relief against the judgment which has been rendered against him in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason, founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party, be shown why the defense was not made in that court." The excuse offered in that case for failure to make the defense at law was that the suit was brought in Greenbrier county; that the defendant resided in Kanawha county, and as soon as he was served with process he sought by letter to employ an attorney to defend his case, and thought he had done so, but was under a misapprehension as to the term at which the ⁴⁸ case would be called for trial, and the attorney he had spoken to, not understanding that he had been definitely retained, failed to appear and make defense, and judgment was rendered against him. On this state of facts this court held the defendant was not entitled to equitable relief. To the same effect see *Knapp v. Snyder*, 15 W. Va. 434; *Alford v. Moore*, 15 W. Va. 597; *Meem v. Rucker*, 10 Gratt. 506. See, also, *Hudson v. Kline*, 9 Gratt. 379, where it was held (first point of syllabus): "In an action at law, the defendant is prevented by unavoidable accident from setting up offsets which he held against the plaintiff, these offsets being in no way connected with the debt sued upon.

He has, however, a plain remedy at law for the recovery of his claims. Held, he is not entitled to enjoin the judgment, and set up his offsets against it, but must pursue his remedy at law for their recovery." In that case Hudson had employed counsel to make his defense, and was taken suddenly ill while in the town in which the courthouse was located, and could not for that reason appear, and yet this state of facts was not considered sufficient to allow him to go into equity for relief. The case of *Faulkner v. Harwood*, 6 Rand. 125, is quoted with approval by Lee, J., in *Slack v. Wood*, 9 Gratt. 43. In the first-named case it was held that, "after a trial at law, a court of equity will not grant a new trial merely because injustice has been done, but the party applying for the new trial must show that he has done everything that could be reasonably expected from him to obtain relief at law." In the case at bar the appellees had been summoned and were in court, and should have informed themselves as to the time the case would be heard, and their failure to do so affords no valid excuse for omitting to put in their defense at law. That one judgment may be set off against another, and the larger one discharged pro tanto, see *Skirne v. Simmons*, 36 Ga. 402, 91 Am. Dec. 771; also *Scott v. Rivers*, 1 Stew. & P. 24, 21 Am. Dec. 646, where it was held that "courts of law, in the exercise of legitimate and incidental powers, have authority to authorize the setoff of one judgment against another existing between the same parties in the same court." The practice in this matter of setting off judgments is indicated in 2 Freeman on Judgments, section 467, where it is said: "The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment against him in favor of the judgment debtor, or, in other words, by setting off one judgment against another. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon, or set off against, a judgment against him. The court, in a proper case, will grant the motion. Its powers to do this cannot be traced to any particular statute, and exists only in virtue of its general equitable authority over its officers and suitors": Citing numerous authorities. See, also, *Waterman on Setoff*, secs. 345, 346.

Now, even if the plaintiffs were honestly mistaken as to the time when the action at law against them was to be heard, and for that reason failed to set off their judgments at the trial, yet here is a plain, complete, and adequate remedy at law, by which

they could on motion have had their judgments set off against the judgment of plaintiff Dawson, and for that reason they should not have been entertained in a court of equity. In the case of *Faulconer v. Stinson*, 44 W. Va. 549, 29 S. E. 1011, this court says: "But in *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16, it is held that mere insolvency of a judgment debtor will not alone justify an injunction to a judgment to let in a setoff which might have been pleaded; this seems well settled": Citing *High on Injunctions*, sec. 132; *Barton on Chancery Practice*, 22; *Hadson v. Kline*, 9 Gratt. 379. Barton, in his *Chancery Practice*, page 22, quotes from the opinion of Staples, J. (*Linke v. Fleming*, 25 Gratt. 707), as follows: "A very interesting question has been raised and discussed by the learned counsel in this case. It is whether the insolvency of a judgment creditor is a sufficient ground for a court of equity to decree a setoff against him upon which the debtor might have successfully relied by way of defense in the action at law, but which he failed to do, without any circumstances of excuse for such failure. This question has never been settled in this court, nor can it be considered as settled by the decisions of foreign courts." And Mr. Barton adds: "The generally received opinion is that where the party had his opportunity to the setoff at law, and gives no excuse for not having done so, the mere fact of insolvency will not entitle him to relief in equity against the judgment." In the case at bar the insolvency of Dawson cannot be regarded as material, for the reason that his ⁵⁰ judgment was the largest, and the plaintiffs' judgments would only be set off pro tanto; and if the judgments had been set off at law, the plaintiffs could not have been injured by the insolvency of Dawson, as they would not have to resort to Dawson's property for any balance.

Applying these principles to the facts in this case, my conclusion is that the mere insolvency of Dawson, in the circumstances, did not entitle the plaintiffs to relief in equity. Neither was the excuse offered to account for their failure to plead their judgments as a setoff in court of law sufficient to entitle them to the relief prayed for. The court erred in overruling the demurrer to the plaintiffs' bill and perpetuating the injunction. The decree complained of is therefore reversed and the bills dismissed.

SETTING OFF ONE JUDGMENT AGAINST ANOTHER is considered in *De Camp v. Thomson*, 159 N. Y. 444, 70 Am. St. Rep. 570, 54 N. E. 11, and in the monographic notes to *Duncan v. Bloom-*

stock, 13 Am. Dec. 729-731; St. Paul etc. Trust Co. v. Leck, 47 Am. St. Rep. 590. While one judgment may be set off against another, to a judgment ripe for execution there can be but one answer, to wit, payment pure and simple: Thorp v. Wegefarth, 56 Pa. St. 82, 93 Am. Dec. 789.

SETOFF AFTER INSOLVENCY is the subject of the monographic note to St. Paul etc. Trust Co. v. Leck, 47 Am. St. Rep. 578-595.

CHILDERS v. NEELY.

[47 W. Va. 70, 34 S. E. 828.]

MINES AND MINING—PARTNERSHIP.—Cotenants or joint tenants of an oil lease who unite and co-operate in working the land leased, though without any express agreement, constitute a mining partnership.

MINES AND MINING—PARTNERSHIP—DISSOLUTION.—A mining partnership is not dissolved by the death or bankruptcy of a member, nor by the sale by him of his interest in the partnership.

MINING—PARTNERSHIP—CONTROL.—Members of a mining partnership holding the major portion of the property have power to do what is necessary and proper for carrying on the business for the benefit of all concerned, in case all of the members of the partnership cannot agree.

MINING—PARTNERSHIP—LOSS FROM BAD FAITH OR NEGLIGENCE—INDIVIDUAL LIABILITY.—Losses from neglect of duty, bad faith, or breach of duty by a member of a mining partnership, or breach of the partnership agreement, or improper diversion of the property of the partnership to purposes foreign to its business, may be charged to him individually in an accounting.

MINING—PARTNERSHIP—LIEN FOR ADVANCES—DIVISION OF PROPERTY.—Members of a mining partnership have a lien on the partnership property for advances made, or balances due, after the payment of debts. Such lien is on partnership property only while distinctly such, and if there is or has been a separation or division of such property, or part of it, the lien is lost.

MINING—PARTNERSHIP—DISSOLUTION.—If a bill is filed by a member of a mining partnership for an accounting and dissolution of the partnership, and sufficient cause for a dissolution is shown, the prayer of the bill should be granted. It is error to enter a decree allowing the partnership to continue business making only a partial account, leaving the assets and business wholly in the possession and control of one member, excluding the other and charging him with a balance on such partial account and leaving other assets untouched by such account.

PARTNERSHIP—ACCOUNT AND DISSOLUTION.—A bill for an accounting between partners which does not also seek a dissolution of the partnership cannot be maintained.

F. L. Blackmarr, for the appellant.

R. McEldowney and G. M. McCoy, for the appellees.

⁷¹ BRANNON, J. Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. Neely admitted the joint ⁷² enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution, if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed.

This case raises an interesting and important subject in this mining state; that is, whether and when joint tenants or tenants in common, jointly operating for oil, are partners or merely co-owners. The bill asserts a partnership, while Neely denies it, asserting that it is a case, not of partnership, but co-ownership.

In two leases of town lots for oil and gas purposes Childers owned one-fourth interest; Ramey, a three-eighths interest; Neely, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership—in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product" instead of "profits," because there was no contract explicit in this point to distinguish product from profit. "Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners without some special agreement which makes them so": Parsons on Partnership, sec. 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar partnership, called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships. What is a mining partnership? 15 American and English Encyclopedia of Law, page 609, says: "When tenants in common of a mine unite and co-operate in

working it, they constitute a mining partnership." Many authorities there cited thus define it: See the California case of *Skillman v. Lachman*, 83 Am. Dec. 96, and note discussing it fully; *Lamar v. Hale*, 79 Va. 147. Mere cworking makes them partners, without special contract: *Barringer and Adams on Mines and Mining*. Courts of equity take jurisdiction of them as if general partnerships: 2 Collyer on Partnership, c. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but "where tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profits and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss": *Duryea v. Burt*, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of *Butler Sav. Bank v. Osborne*, 159 Pa. St. 10, 39 Am. St. Rep. 665, 28 Atl. 163, and other cases in that state cited in *Bryan on Petroleum and Natural Gas*, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That state does not recognize such a partnership. Justice Field said in *Kahn v. Smelting Co.*, 102 U. S. 645: "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, a *delectus personae* (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this *delectus personae* that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, ⁷⁴ one chosen member is gone, the union broken, because he may have been the chief dependence for success,

and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership those occurrences make no dissolution, but the others go on; and in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this *delectus personae* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority, nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business: *Charles v. Eshleman*, 5 Colo. 107; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96, and note; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107; *Jones v. Clark*, 42 Cal. 181; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Congdon v. Olds*, 18 Mont. 487, 46 Pac. 261; *Judge v. Braswell*, 13 Bush, 67; *Waldron v. Hughes*, 44 W. Va. 126, 29 S. E. 505. In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g., a partnership to run a theater or other single enterprise only: *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681; *Deardorf v. Thacher*, 78 Mo. 128, 47 Am. Rep. 95; *Smith on Mercantile Law*, 82; *Parsons on Partnership*, sec. 85; *Pooley v. Whitmere*, 10 Heisk. 629, 27 Am. Rep. 733. A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business: *Bates on Partnership*, sec. 329. Members of a mining partnership holding the major portion of property have power to do what may be necessary and proper for carrying on the business and control the work, in case all cannot agree, provided the exercise of such power is necessary ⁷³ and proper for carrying on the enterprise for the benefit of all concerned: *Dougherty v. Creary*, 30 Cal. 290, 89 Am. Dec. 116.

These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts: 5

American and English Decisions in Equity, 74; 17 Am. & Eng. Ency. of Law, 1273.

Neely excepted to the commissioner's report of settlement because of the allowance to Ramey of an expenditure advanced by Ramey of three hundred and sixty-nine dollars and seventy-five cents, as excessive, and because for repairs on two boilers without his consent. If the parties were mere joint tenants, consent would be necessary: *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746. But being partners, as above stated, a partner has power to order necessary repairs. Besides, Ramey owned a majority interest. The boilers were burnt badly, and it seems that this outlay, though large, is proven, and was necessary and usual in such a business, and, if unattended with other circumstances, would be clearly allowable under principles above stated. The commissioner reports that the injury to the boilers came from neglect of the pumpers; but much evidence tends to show that Ramey, without consent of Neely, removed the boilers off the ground owned by the firm, upon a lease of Ramey and Childers, in which Neely had no interest, and used them with another boiler in boring and operating wells thereon in connection with these wells of the firm in Neely's absence, and put too much work upon them, with inadequate supply of water, which, likely, by heavy firing, caused the burning of the boilers. If this is so, how can Ramey expect pay for this outlay? Would so serious an injury have occurred to the boilers had this improper use of them not been made? We cannot say so with certainty, but it seems not likely. Ramey has no just claim to be repaid expenditure for repairs caused by himself—the diversion of the firm property to his own work from the work of the firm. Losses from neglect of duty or bad faith of a partner, or breach of duty, or breach of a partnership agreement, or improper diversion of its property to purposes foreign to its business, will be charged to him in accounting: 17 Am. & Eng. Ency. of Law, 1217; 1 Collyer on ⁷⁰ Partnership, sec. 312; Story on Partnership, sec. 169; Parsons on Partnership, sec. 151. Ramey does not deny such use.

The exception for the two hundred and thirty-nine dollars and seventy-five cents allowed Ramey for three-eighths of expense seems not well taken, and was properly overruled. The commissioner reports that Neely should be allowed nothing for such use of the boilers for business of Childers and Ramey outside the legitimate firm business, yet allows him one hundred dollars therefor. We are unable to say that such sum is not

correct in amount, and will have to sustain the commissioner as to it.

Neely excepted because the commissioner reported that he was not entitled to any allowance on the claim made by Neely, that by reason of the use of the firm's boilers in boring and operating wells of Childers and Ramey on adjoining leases owned by them, in which Neely was not interested, the two wells of the firm, which had been bored before the others were and were paying wells, were often shut down and unproductive, while those other wells were going on, and that by reason of want of water and steam, and the inadequacy of the engines to run all the wells, five or six in number, the production of the firm's wells was diminished. The commissioner says that Neely suffered no appreciable injury thereby. If injured at all, it was appreciable and to be estimated. Ramey states, in short, that Neely was not entitled to a cent on this score. Neely's evidence is distinct that he was there numerous times, and found these two wells still. He swears to a large loss from this cause. He furnishes considerable evidence to sustain him in some loss from this score, and it seems that equity should make some compensation for it. There is evidence that Ramey, when asked why the wells were shut down, said that he had a larger interest in the other wells. Ramey (having bought out Childer's interest, and Neely being absent almost all the time of operation) had sole charge. The commissioner bases his opinion of no injury to Neely from pipe line reports, which are before us, but it does seem from the evidence that the firm business was neglected, and loss to it accrued therefrom to an appreciable extent, for which some compensation should be made. It is difficult to say what should be allowed on this account, it being a thing of only approximate estimate; and still it ⁷⁷ seems an allowance should be made, as Ramey is claiming for outlay and himself controlled the business.

When this suit was brought Childers and Ramey obtained in it an injunction enjoining the pipe line companies transporting the firm's oil from paying Neely for his share of the oil to which he was entitled under his division orders, and enjoining Neely from any further participation in the partnership and from selling his share of the oil, thus taking from him the wells and their proceeds and leaving Ramey in sole charge of them. Neely complains that the court refused to dissolve this injunction. His counsel says there was no right to it, as the bill charged no insolvency. The bill, however, did charge that Neely had failed

to contribute his part of the expense of the business, and that Ramey and Childers had made large outlays therefor, and that Neely had refused to make settlement, and was largely indebted to his associates from the transactions of the partnership. This justifies the injunction if the oil of Neely were social assets, as partners, in advancing for expenditures for the partnership, have a lien on partnership property for advances: *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 109; *Duryea v. Burt*, 28 Cal. 570; *Parsons on Partnership*, sec. 402, note. But this lien is only on partnership property while distinctly such; for it is the law that if there is a separation or division of the property, or part of it, there is no lien. If two partners consign goods for sale, and direct the consignee to carry the proceeds to the account of each, and it is done, neither partner has any lien on the share of the other in those proceeds, though it would have been otherwise if they had remained part of the common property: 2 *Lindley on Partnership*, sec. 683; 1 *Collyer on Partnership*, sec. 108, note. Now, these partners agreed to have division orders when they began business—that is, the pipe lines to give each certificate of his share of the oil committed to them, which was a product of the wells; and this effected a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment. There being no lien there was no justification for the injunction. It perhaps disabled Neely from paying as the bill demanded of him.

There is another error in the proceeding. The bill demanded ⁷⁸ a dissolution. It showed abundant cause, and the evidence shows abundant cause, of dissolution. The bill charges that the plaintiffs and Neely made a settlement to a certain date, but that they had been unable to get Neely to make a settlement since then; that he was violent and abusive, had threatened them with violence, and declared he would have nothing more to do with them; that he would not contribute to expenses; that bills remained unpaid; and that because of the unsatisfactory condition of the business, and the "disagreements, dissensions, and disaffections between the partners, the property and business were suffering." The evidence shows these disagreements and dissensions. Thus, it was plain that the business was hopeless of success and prosperity, and the interests of all parties demanded absolute dissolution at the hands of the law. Reconciliation, harmony, and success were utterly beyond hope: 17 *Am. & Eng. Ency. of Law*, 1104. Therefore, the court should

have decreed dissolution absolute, and directed an account of the partnership and wound it up. But it decreed no dissolution, but, on the contrary, suffered the partnership still to subsist, and, indeed, go on in the sole hands and management of Ramey, excluding Neely therefrom, and decreed that the settlement by the commissioner should only apply to its date, leaving it open to future account. The decree perpetuated the injunction, forever prohibiting Neely from participation in the business, and provided that when he should pay four hundred and eighty-seven dollars and fifteen cents found due from him, and costs, the injunction should cease. That excellent, very late work, containing the leading late decisions in equity in America and England, the American and English Decisions in Equity, with elaborate notes collecting decisions (volume 5, page 52), lays down the rule that equity can only entertain jurisdiction for an account when it can make a final decree in the suit: Citing *Randolph v. Kinney*, 3 Rand. 394. That work (page 109) says: "As a general rule, a bill for accounting between partners which does not also seek a dissolution of the partnership will not be maintained": Citing cases, among them, *Colville v. Gilman*, 13 W. Va. 314, in which Judge Green fully sustains this position; *Parsons on Partnership*, sec. 206; 2 *Lindley on Partnership*, 948. If there ever were cases which, by ⁷⁰ bill and proof, called for dissolution and final account, not partial, this is one. And besides the showing of bill and proof, a petition for rehearing alleged that Ramey had sold the boilers. The evidence so shows. This would charge Ramey to credit of Neely. There was partnership property in Ramey's hands. There could only one adequate relief be given—dissolution, sale of the property entire, and full account. But no provision was made for dissolution, sale, or full account—only a partial settlement and decree against Neely for the sum found by it. The bill alleged that the property could not be divided in kind. If the injunction applied to property belonging to the firm on which a lien rested for the other partners, it would be proper to continue it until final account and decree: *Robrecht v. Robrecht*, 46 W. Va. 738, 34 S. E. 801. But Neely's share of the oil was his separate property. And I do not see why he should, without cause, be excluded from participation, letting Ramey have sole control. A receiver, impartial between them, was proper under the circumstances. "If no dissolution is sought, a receiver and manager will not be appointed; but with a view to a dissolution or winding up, a receiver and manager will be appointed, if there

are any such grounds for appointment as are proper in other cases, or if the partners cannot agree to working the mines until sold": Collyer on Partnership, sec. 381. Therefore, we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.

MINING PARTNERSHIP.—THERE IS NO *delectus personae* in a mining partnership; and the decision of the members owning a majority of the shares or interests, and not the majority of persons, binds it in the conduct of its business: See the monographic note to Skillman v. Lachman, 83 Am. Dec. 106, 107; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116.

MINING PARTNERSHIP.—WHERE SEVERAL OWNERS of a mine unite and co-operate in working it, they form a mining partnership: Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96; Dougherty v. Creary, 30 Cal. 290, 89 Am. Dec. 116. But see the note to Skillman v. Lachman, 83 Am. Dec. 105.

PARTNERSHIP.—AN AGREEMENT BETWEEN COTENANTS of an oil lease to drill an oil-well on the leased premises, at the common cost of the cotenants, does not create a partnership agreement, as between them: Dunham v. Loverock, 158 Pa. St. 197, 33 Am. St. Rep. 838, 27 Atl. 990.

EACH MINING PARTNER HAS A LIEN on the partnership property for money advanced by him for the use of the partnership: See the monographic note to Skillman v. Lachman, 83 Am. Dec. 100.

McCLUNG v. McWHORTER.

[47 W. Va. 150, 34 S. E. 740.]

JUDGMENTS—RELIEF IN EQUITY FROM.—EQUITY CANNOT ENJOIN a judgment and grant a new trial because of a false return of service of process unless it appears that if a new trial is granted a good defense will produce a different result.

JUDGMENTS—RELIEF IN EQUITY FOR FALSE RETURN OF PROCESS.—An officer's return on judicial process cannot be contradicted by parties or privies in its statement of such facts as the law requires him to state to make the return good, unless it is shown that the party is in collusion with the officer to make a false return. In the absence of such proof relief cannot be obtained in equity.

L. J. Williams and C. S. Dice, for the appellant.

Preston & Wallace, for the appellee.

¹⁵¹ BRANNON, J. J. M. McWhorter recovered a judgment in an action in the circuit court of Greenbrier county against
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Charles L. McClung. McClung at the same term moved the court to set aside the judgment and give him a new trial, on the ground that he was not served with process, and knew nothing of the suit for several weeks after the return of the process; but the court refused to do so. Then McClung brought this chancery suit to enjoin the enforcement of the judgment. The court overruled McWhorter's demurrer and perpetuated an injunction, and he appealed.

It is argued that there is error in not sustaining the demurrer, because the bill does not aver that McClung has any defense to the action, and why enjoin or grant a new trial if he has not? The law of new trial requires that it be shown that the party has a just defense. So equity does not enjoin a judgment and grant a new trial for a vain purpose. It has even been held that, where there is a false return of service of process in those jurisdictions where equity relieves for that cause, there must be averment and proof that if a new trial is granted a good defense will produce a different result; and such is the preponderance of authority. Tested by this law, the bill is bad: *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Freeman on Judgments*, sec. 498; *Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135, 139. There is no question that, in general, equity does require such allegation and proof before relief against a judgment; but I think it illogical doctrine, and likely it would be everywhere so held, where there is no show or color of service of process; and I would think, therefore, that in states where it is allowable to show the falsity of an officer's return, it should be likewise under the doctrine that judgment without notice is void, and its enforcement a taking of property without due process of law. As our courts do not allow regular returns to be falsified, the question is immaterial. If they did, the bill must so state. I have no idea they would require such showing where there is no return of service at all.

The bill relies on one ground only for relief; that is, that the return of the sheriff shows that he served the process ¹⁵² on McClung by delivering it to Vonie Shauver, as a member of his family, and at his usual place of abode, whereas in fact she was not a member of his family, and the place of service was not at his usual place of abode. Thus, the proposition is to deny the facts stated in the sheriff's return. In many states this can be done, but in this state a sheriff's return on process emanating from the courts (judicial process) cannot be contradicted by parties or privies in its statement of such facts as the law requires

him to state to make the return good. The party must for reparation of his injury look to an action against the sheriff on his bond for false return. This may seem hard, but public policy requires, for stability of judicial proceedings, that the return of the sworn officer stand. It is a long-established rule with us, and based on sound principles and policy. Its reason, drawn from the United States supreme court, is ably defended in *Preston v. Kindrick*, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588, refusing relief in equity against a decree by default where relief was asked on the ground of false return. I will only refer to the cases: *Goodall v. Stuart*, 2 Hen. & M. 112; *Smith v. Triplett*, 4 Leigh, 590; *Bowyer v. Knapp*, 15 W. Va. 277; *Stuart v. Stuart*, 27 W. Va. 168; *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *Peck v. Chambers*, 44 W. Va. 270, 28 S. E. 706; *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608. This doctrine does not apply to notices to take depositions or other notices given by parties, nor to returns by private parties: *Bowyer v. Knapp*, 15 W. Va. 277; *Chambers v. Peck*, 44 W. Va. 270, 28 S. E. 706. I remark, too, that where a suitor colludes with the officer to make a false return, it is not conclusive. That is the exercise of jurisdiction to annul a judgment for fraud.

Another reason against the decree is that, if there were any relief for the cause stated, it was by writ of error for the refusal of a new trial; but there was no relief at law or in equity, as the same rule that the return is conclusive prevails in both courts: *Opinion in Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608. We reverse the decree, dissolve the injunction, and dismiss the bill.

JUDGMENT, RELIEF FROM.—WHERE A FALSE RETURN of the service of process upon which a judgment was based was not procured or induced by the plaintiff, the defendant cannot obtain relief in equity, but is left to his remedy against the officer who has made the false return, except in those cases where relief can be procured by motion in the original suit: *Preston v. Kindrick*, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588. But see the discussion of this question in the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 245, 246, on relief in equity against judgments.

LINN v. COLLINS.

[47 W. Va. 250, 34 S. E. 916.]

ASSIGNEE FOR CREDITORS—SALES OF, WHETHER FREE FROM LIENS.—If an insolvent makes a general assignment of his property for the benefit of his creditors, including therein two parcels of land upon each of which a vendor's lien exists, and they are advertised and sold by the assignee without mentioning such liens in the notice of sale, for an adequate price, the rule of caveat emptor does not apply to the purchaser, and he has a right to discharge such lien out of the purchase price paid by him.

J. M. Hamilton, for the appellants.

Linn, Withers & Brannon, for the appellee.

²⁵⁰ ENGLISH, J. On the twenty-second day of February, 1893, Robert F. Kidd and wife executed to R. G. Linn, trustee, a deed of assignment, whereby Kidd conveyed to said trustee all of his property, to be applied pro rata to the payment of his debts, providing therein that it should be the duty of said trustee, as soon as practicable, to sell the real and personal property therein conveyed on a credit and upon the terms therein ²⁵¹ set forth, and out of the net proceeds to pay the several creditors who should prove their debts as therein required, pro rata. A part of said real estate so conveyed was four and one-half eighths, undivided, in a lot of two hundred and forty-five acres of the Joshua Reed farm on Sycamore; one undivided half in the dower lot of one hundred and fifteen acres conveyed to said Kidd and Louis S. Reed, and the heirs of Joshua Reed; and sixteen-seventeenths of lot No. 21 on Main street, in the town of Glenville, West Virginia, being the same property on which said Kidd resided at the date of said assignment. In pursuance of said deed of assignment said trustee advertised all of said property for sale on the 5th of June, 1893, at which sale Spencer Collins became the purchaser, bidding for said Kidd's interest in the Reed farm two thousand two hundred dollars and for the Glenville lot one thousand dollars, complying with the terms of sale by executing his notes, with A. S. McQuain and S. A. Hays as his sureties. Nothing having been paid on said notes, Linn, trustee, filed his bill in the circuit court of Gilmer county against said Collins, seeking to subject said real estate to sale to satisfy the same. A portion of the original purchase money for said lot and the interest in said Reed farm remained unpaid at the time said deed of assignment was executed to Linn, trus-

tee, and vendors' liens had been retained to secure this unpaid purchase money. The defendant Collins, in his answer to plaintiff's bill, claims that previous to said sale there was an understanding with the trustee and Hays, one of the principal creditors, whereby he was to bid one thousand dollars for the house and lot in Glenville, and two thousand two hundred dollars for said Kidd's undivided interest in the Reed farm, and was to become the purchaser of said real estate if knocked off to him at said bids, and was to have said purchase money applied first to the discharge of said vendors' liens. Defendant also claims that he stated at the time the advertisement of sale was mentioned that he would not buy the lands at all subject to said liens. Depositions were taken in the cause both for plaintiff and defendant, and several of those taken for defendant were excepted to by defendant Hays, so far as they related to a parol agreement between Collins and exceptor or exceptor ²⁵³ and R. F. Kidd. A decree was rendered holding that the plaintiff was entitled to recover from the defendant the amount of his purchase money notes, with their accrued interest, without allowing him to apply any portion thereof to the extinguishment of said vendors' liens, and directing that unless the defendants, Spencer Collins, S. A. Hays, and A. S. McQuain, should pay to the plaintiff, R. G. Linn, trustee, four thousand and ninety-three dollars and eighty-six cents, with interest thereon from the 4th of February, 1898, until paid, within thirty days from the rise of the court, that certain special commissioners therein named should advertise and sell said property upon the terms and in the manner therein indicated. From this decree said Collins obtained this appeal.

The question presented for our determination in this cause is whether the appellant was entitled to apply a sufficient portion of the purchase money bid by him for said real estate to extinguish the vendors' liens existing against said property to secure the balance remaining unpaid by said Kidd, and, as to his claims against Kidd, to a pro rata with the other creditors as to the residue of the purchase money. I can see nothing inequitable that would result from allowing Collins to pay off said vendors' liens. He seems to have bid a fair price for the property, without reference to the vendors' liens existing thereon. In the notice of sale said trustee gave a general description of said lot and interest in the Reed farm, and remained silent as to the vendors' liens existing against them. Now, if Kidd had sold and conveyed this property him-

self, with the same general description, for the purpose of raising money to discharge his indebtedness, he would not thereby have deprived the owners of these vendors' liens from enforcing their liens against the property. Can we say that by conveying to Linn, trustee, he conferred upon him the right to sell said property free from said liens? In other words, could Kidd confer upon said trustee more than he himself possessed? Kidd's creditors had a right to satisfaction out of his property, subject to the valid liens existing thereon. Collins himself appears to have been one of Kidd's largest creditors. This was a very different case from that of *Fleming v. Holt*, 12 W. Va. 143, in which there ²⁵³ was a deed of trust executed to a trustee to secure the payment of a particular debt therein described, while in the case at bar there was a general assignment by Kidd for the benefit of all of his creditors—Collins among the number. 2 Beach on Modern Contracts, section 1246, thus states the law: "Under a general assignment for the benefit of creditors, the assignee takes the choses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities existing against them in the hands of the assignor. The assignee is the mere representative of the assignor and his estate, and stands in his shoes." Burrill on Assignments, section 374, page 517, says: "The maxim *caveat emptor* does not apply to the case of a sale by assignees for the benefit of creditors, whether the property be real or personal. And where an assignee under a voluntary assignment for the benefit of creditors sold at public sale a tract of land which had been purchased by the assignor under articles of agreement duly recorded, and in the advertisement it was described generally as a tract of land belonging to the assignor, it was held that the purchaser at the assignee's sale was entitled to a deduction from the purchase money of the amount due the original owner." Suppose Collins is allowed out of said purchase money to pay off the vendors' liens on said lot and tract of land; could R. F. Kidd or his creditors say that they were prejudiced thereby? Linn, in making the sale, surely did not sell more than Kidd owned at the time the assignment was made. All parties had notice and understood that a balance of purchase money was secured by vendors' liens reserved thereon, and if the property was sold for an adequate price without reference to said liens, as it appears to have been, the creditors would obtain the benefit of all that Kidd was entitled to if these liens were discharged by Collins out of the purchase money. Without reference to

the testimony, which seems to be somewhat conflicting, I am of opinion that, as a matter of equity, the appellant had the right to pay off said vendors' liens, and to that extent was entitled to a credit on his purchase money notes executed to said Linn, trustee, and that S. A. Hays and the other creditors of Kidd were not entitled to participate in the pro rata distribution ²⁵⁴ of the proceeds of said sale until the amount necessary to pay off and discharge said vendors' liens was deducted therefrom, and Collins allowed to apply the same in discharge thereof. For these reasons the decree is reversed and the cause remanded.

THE DOCTRINE OF THE PRINCIPAL CASE, that the maxim of caveat emptor does not apply to a purchaser at a sale by an assignee for the benefit of creditors is supported by *Adams v. Humes*, 9 Watts, 305; *Lindemann v. Ingham*, 38 Ohio St. 1, 14.

AN ASSIGNEE FOR THE BENEFIT OF CREDITORS stands in no better position than his assignor: *Dickson v. Kittson*, 75 Minn. 108, 74 Am. St. Rep. 447, 77 N. W. 820. He is not a purchaser in good faith: *Brown v. Brabb*, 67 Mich. 17, 11 Am. St. Rep. 549, 84 N. W. 403.

HALL v. VERNON.

[47 W. Va. 295, 34 S. E. 764.]

PARTITION OF OIL AND GAS.—Co-owners of oil and gas, not owning the surface of the land, have no right to partition except by sale and division of the proceeds, and a decree of partition as to such oil and gas separate from the surface by allotting it by sections of the surface is void.

V. B. Archer, for the appellant.

Casto & Fleming, Van Winkle & Ambler, and J. H. Riley, for the appellees.

²⁹⁶ BRANNON, J. Hall brought a suit in equity against Vernon and others in the circuit court of Wirt county, alleging that a tract of eleven hundred and three acres of land was, as to the surface, owned by Messrs. Doneho and Vernon, and that they had divided the surface; that the tract contained oil; that Messrs. Doneho, Vernon, and Hall owned the minerals in it, each a third; and that in a suit brought by Hall and Vernon against Doneho and others some years before there had been a decree of partition of the mineral ownership into lots forty rods wide, and running to the exterior of the tract, which decree the bill in this case alleged had been obtained through fraud

of Vernon, and it sought to annul the decree. The bill alleged that Vernon under this decree was taking oil from the lots assigned him, and using tanks, machinery, etc., belonging to all three persons in his operations. The bill asked (and it was granted) an injunction restraining Vernon from operating oil wells on the tract, and from selling oil produced thereon, and restraining the pipe line companies from paying Vernon for oil, or giving him certificates for oil deposited with them. A decree dissolved the injunction so far as it related to the land or the partition assailed, the court holding that the decree of partition had not been obtained by fraud. Hall appealed.

A majority of the court are of opinion that the decree of partition is void, and constitutes a cloud over Hall's title, which a court of equity will dispel by setting aside the decree. They take this position on the ground that oil and gas are fugitive, and that co-owners of them, not owning the surface, have a mere right to explore for them, and that it is impossible to partition the same in kind, owing to the nature of oil and gas, and that a court cannot be called on to do an impossible thing, and has no jurisdiction to partition such a right by allotting gas and oil under certain sections of the surface. They hold that partition can be ²⁹⁷ made only by sale and division of proceeds. Counsel cites the following authorities for that view: *Gill v. Weston*, 110 Pa. St. 312, 1 Atl. 921; *Freeman on Cotenancy and Partition*, sec. 436; 15 Am. & Eng. Ency. of Law, 607; *Aspen etc. Smelting Co. v. Rucker*, 28 Fed. 220; *Conant v. Smith*, 1 Aiken, 67, 15 Am. Dec. 669; *Bainbridge on Mines and Minerals*, 155; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Kemble v. Kemble*, 44 N. J. Eq. 454, 11 Atl. 733.

I am of the opinion that there may be partition of oil and gas owned in fee separate from the surface, by allotting it by sections of the surface. True, one may not get any oil; but the chance is equal for all—the best that can be done to avoid the sale of the property from its owners, which they have right to develop separately, as they have right to a partition in kind, if possible. Oil in place is realty, and therefore partition may be had of it where the tract is of considerable area: *Freeman on Cotenancy and Partition*, secs. 433, 435; *Hughes v. Devlin*, 23 Cal. 501; *Barringer and Adams on Mines and Mining*, 54; *Marble Co. v. Ripley*, 10 Wall. 339. Also, I think that, as equity has jurisdiction in partition, it can determine whether the subject is partible or not, and that even if the decree be erroneous, it is not void in a legal sense.

The decree dissolving the injunction is reversed and the cause is remanded, with directions to the circuit court to enter a decree setting aside the decree of partition and perpetuating the injunction, and to proceed further as to matters of personal property before it.

DENT, P., concurring. The decree of partition in this case did not pretend to divide the solid minerals in the land, as none were shown to exist; and such a partition as was made would be inequitable and unjust if any such solid minerals existed, for it divided the land into twelve narrow strips and allotted to each of the three owners several of these strips alternately, so that each owner's mineral properties were divided into several distinct strips, separated from each other by the strips belonging to the others. This would destroy the value of the solid minerals, for each party would have to work each tract of his separated minerals separately, instead of having them in one compact body. This decree ²⁹⁸ is nothing more than a decree to divide the carbon oil, volatile minerals, gas, and gaseous vapors supposed to be or that might exist under the land in controversy by imaginary lines drawn over the surface of the land. Equity is natural justice. It is equality. It never does a vain thing or enforces a void or impossible contract. Men may divide the moon by imaginary lines, but equity will not enforce their contract. They may divide the water in a well or in a brook, or the game in the forest, or the fishes in the sea, but equity will afford them no such relief. "Oil and natural gas are minerals, in the view of the law; but because of their peculiar attributes they, as the subject of property, differ from other minerals. . . . Out of possession there is no property in them. . . . They are not capable of distinct ownership in place, owing to their liability to escape from the place where they may be temporarily confined without necessarily any interference on the part of the owner of the soil, or others claiming through him, under whose land they may be found. Like water, they are not the subject of property, except in actual occupancy, and a grant of them passes nothing for which ejectment will lie. . . . Oil and gas cannot, while in the ground, like the solid minerals, be the subject of an estate distinct from that in the soil": Barringer and Adams on Mines and Mining, 30, 31. A grant to the oil and gas passes nothing for which ejectment will lie. It is a right, not to the oil in the ground, but to the oil the grantee may find: *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732. So the reservation

of the oil and gas is not of the oil and gas in the ground, but of the oil and gas the grantor or his assigns may find and reduce to possession, with the exclusive right to search therefor. Natural gas is incapable of being absolute property, and is the subject of qualified property only: *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210, 57 Am. Rep. 659. "A grant or reservation of oil or gas in certain land passes an incorporeal right only. This arises, as has been above explained, from the nature of oil and gas, which is such that a corporeal interest in them in place cannot be created": *Barringer and Adams on Mines and Mining*, 78. "There can be no property in rock or mineral oil, nor can title thereto be devised or acquired, until it has been taken from the ²⁰⁰ earth": *Shepherd v. McCalmont Oil Co.*, 38 Hun, 37. Oil and gas grants and reservations are incorporeal hereditaments, which are entire and indivisible at law, though they may be made divisible by the terms of the grant: *Funk v. Haldeman*, 53 Pa. St. 229. From these authorities it is plain that a reservation or grant of oil and gas privileges is a mere incorporeal hereditament, which is indivisible, because a division of the right would create new rights to the prejudice of the owner of the soil, and because, so long as the oil and gas remain in place, they are incapable of allotment according to quantity and quality: *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880. In the case of *Kemble v. Kemble*, 44 N. J. Eq. 454, 11 Atl. 733, it was held that "a partition of lands containing mineral deposits cannot be ordered if the location, extent, and value of such deposits cannot be ascertained": *Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Grubb v. Bayard*, 2 Wall. Jr. 81, Fed. Cas. No. 5849. If such is the case with solid minerals, how absurd it is to even talk of partitioning in kind oil or gas of whose existence, quantity, and location the court is in entire ignorance! And if three owners of such a right can have partition in kind, they can transfer their interests to others, without regard to numbers, until they would be of such multitude that an attempted partition in kind would entirely destroy the use of the surface to the owner of the land, and yet there exist neither oil nor gas to be partitioned. Such a partition as was attempted to be made in this case was a mere nullity, as it partitioned nothing; and yet it operates as a cloud on plaintiff's rights, in fraud of which it was procured by the defendant Vernon. It being so plainly in excess of the powers of a court of equity, it was proper to set it aside on motion, petition, or in any other way.

its illegality could be presented to the court from which it was procured, without the necessity of resort to an appeal. It was not only voidable, but void, because it undertook to accomplish the impossible. Equity never undertakes to divide the unseen or invisible, but only that which it can see and measure so as to produce equality. Air, gas, water, and oil are not susceptible of partition in kind, independent of land, either when hidden beneath the surface or floating above it, but only when ³⁰⁰ reduced to actual possession and control. Neither are the rights and privileges to acquire possession of these fugitive substances susceptible of partition in kind, but they may be sold, and the proceeds thereof divided. The land under which the oil and gas is supposed to exist may be partitioned in such manner among the co-owners of the surface as to effect a division of the gas and oil privileges, but not in the manner attempted in the present decree: *Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

None of the authorities referred to in Judge Brannon's dissenting opinion in this case support the position that the attempted partition is justifiable. On the contrary, they are directly to the reverse. Nor have I been able to find any that do after the most diligent search. In *Freeman on Cotenancy and Partition*, section 435, it is said: "But where the interest sought to be partitioned is not a distinct right of property in the mines, but a mere license to mine in the lands of another, it is indivisible, because a division of the right would create new rights, and would prejudice the owners of the soil, and because, so long as the minerals and ores which are the subject of the servitude are in place, unwashed and unsevered from the soil, they are incapable of allotment according to quantity and quality, relatively considered": References by the author; *Hughes v. Devlin*, 23 Cal. 505; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263. In *Barringer and Adams on Mines and Mining*, page 54, it is said that "mining rights are indivisible (that is, nonpartible in kind), but they may be assigned as a whole." The author refers to *Marble Co. v. Ripley*, 10 Wall. 339, to sustain this position. Where land is leased with the exclusive privilege of boring for oil and gas, the lessee takes a corporeal interest in the land, and a different rule prevails from that where there is a sale of the surface and a reservation of the oil and gas. The latter is, as heretofore shown, an incorporeal interest, and amounts to the mere grant of a right or privilege nonpartible in kind. Plaintiff is a joint owner of the oil and

gas, but has no interest in the surface except with his co-owners, likewise cotenants in the surface. He has the indivisible right with them to bore wells for the extraction of oil and gas, but has no separate right to enter on the lands at any place to bore for oil or gas. So that when ³⁰¹ the court by its anomalous partition undertook to divide the oil and gas by imaginary lines over the surface, it could not confer on plaintiff the right to enter on the divisions assigned to him, for this right he did not possess, nor was he entitled thereto; and any of the cotenants of the surface have the legal right to prevent him from so doing: *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411. Hence, the effect of the court's decree, if permitted to be of any force, was to take away and destroy plaintiff's reserved rights to the oil and gas. Thence its nullity; for if plaintiff had no separate right to bore for oil and gas, he had the right to demand his share of the oil and gas brought to the surface by his co-owners, notwithstanding the decree. The decree, therefore, was nothing more than an absolutely void cloud that hindered him from the enjoyment of his interest in the oil and gas produced by his co-owners in the exercise of their indivisible right to produce the same. For this he could not sue in ejectment, and his only adequate remedy was by an appeal to a court of equity, which could nullify the void decree, and at the same time restore to him his dispossessed rights. While it is true that a court of equity has jurisdiction to determine what property is partible, it has no jurisdiction to partition property which is nondivisible, and thus entirely destroy it; for in attempting to do so it exceeds its jurisdiction, and renders its decree void. It ceases to be a court of equity, and becomes a court of inequity, inequality, and injustice. It assumes a jurisdiction over property not given to it either by common statute or constitutional law, in violation of the natural and reserved rights of the individual, and its decrees are nullities and binding on no person. "If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void": 1 Freeman on Judgments, sec. 120c. Under no circumstances had the court the authority to grant this decree attempting to partition an indivisible right: *Norfolk etc. R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196. Although the court have jurisdiction of the subject matter and the person, yet if it grants relief which under no circumstances it has the authority to grant, its judgment is void: *Fithian v. Monks*, 43 Mo. 502. The

and decree was both physically and legally impossible. The decree in this case should be reversed, the decree of partition vacated as a nullity, and the cause remanded for further proceedings according to principles governing courts of equity.

FOR PARTITION OF MINERAL INTERESTS, see *Dall v. Confidence Silver Min. Co.*, 3 Nev. 531, 93 Am. Dec. 419; *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027; *Conant v. Smith*, 1 Alken, 67, 15 Am. Dec. 689.

ON PROPERTY IN PETROLEUM OIL AND GAS, and the nature thereof, see *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 63 Am. St. Rep. 721, 49 N. E. 399; *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210, 57 Am. Rep. 659; *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 855.

CAMDEN v. DEWING.

[47 W. Va. 310, 34 S. E. 911.]

CONTRACTS—CONSIDERATION.—WITHHOLDING COMPETITION, when not contrary to public policy, is a sufficient consideration for a contract.

CONTRACTS — CONSIDERATION — SPECIFIC PERFORMANCE.—If two persons engaged in buying lands in the same locality, to avoid competition and secure the lands at low rates, agree that one shall buy for both, and that the lands purchased shall be divided between them, and one of them retires from business while the other buys the lands according to the agreement, taking deeds therefor in his own name and then transfers them to a third person, who promises to discharge the agreement to divide, but subsequently refuses to do so, equity may decree specific performance.

APPELLATE PRACTICE—PREPONDERANCE OF EVIDENCE.—The findings and decree of the lower court cannot be disturbed on appeal unless they are against a plain preponderance of the evidence, and if the evidence is so conflicting that reasonable men might differ as to the conclusion to be reached, the decree cannot be disturbed.

W. T. Ice and E. D. Talbott, for the appellants.

Mollohan & McClintic, W. G. Mathews, and F. Woods, for the appellees.

³¹¹ **DENT, P.** In June, 1890, Johnson N. Camden filed a bill in chancery in the circuit court of Greenbrier county against William S. Dewing, James H. Dewing, and Charles A. Dewing, partners doing business in the firm name of Dewing & Sons, for the purpose of compelling them to execute to him a deed

for about fifteen thousand acres of land situated in Greenbrier, Nicholas, and Webster counties. The case is as follows, to wit: In the year 1885 A. H. Winchester was acting as agent of Dewing & Sons in purchasing wild lands in this state. While so engaged he formed a partnership with Elihu Hutton for the purpose of purchasing lands on the waters of Gauley river. This firm carried on operations, beginning with the summer of 1885, continuously for several years. In its operations it learned that the plaintiff held options from many of the land owners, and that he, too, was buying the lands that they were after. They thereupon approached the plaintiff and proposed to ⁵¹²do away with opposition, by letting one party do all the buying of the lands, and they would be able to secure them at a lower figure than otherwise. The plaintiff informed them that he was anxious to complete his purchases of what were known as the "Caperton lands," as he already held part of them, and agreed that if they would purchase such lands for him he would surrender all options outside thereof, and permit them to be the only buyers in the field. This they agreed to do. He carried out his part of the contract by surrendering his options and withdrawing as a purchaser. They went ahead in accordance with this understanding and secured the title to about fifty thousand acres of land. Bernard J. Butcher was also taken into the partnership, but afterward parted with his interest to his copartners. The funds used in paying for this land were derived directly or indirectly through the purchases of other land from Dewing & Sons. After the purchases had all been effected Winchester induced Dewing & Sons to purchase the same at the rate of two dollars per acre, they assuming his share and obligations and buying out Hutton. All the lands were then deeded to Dewing & Sons. The arrangement between Camden and Winchester was reduced to writing, in the shape of a letter directed to Bernard L. Butcher, and signed by said Winchester on the third day of July, 1887. Winchester, Hutton, and Butcher, all of whom are made parties to this suit, fully admit the truth of this arrangement. Dewing & Sons deny they knew anything of it, and claim they were wholly taken by surprise when the plaintiff demanded a deed from them for these Caperton lands, and they refused to be bound by the arrangement so made. Winchester, Butcher, and Hutton in their depositions claim that Dewing & Sons, through their representative, William S. Dewing, were fully informed of the arrangement and acceded thereto, but insisted that as

he paid for the lands the title thereto should be vested in him, and he be permitted to settle with plaintiff and hold the title for him. The Dewings deny this in their testimony. This presents but two propositions for the consideration of this court: 1. Is this such a contract as a court of equity will enforce? 2. Is the proof sufficient to sustain the decree?

318 1. As to the first proposition, there can be no doubt. If the title to the property still remained in Winchester and Hutton, equity would promptly enforce specific performance. They do not deny it, but admit it. It is true no money has been paid as yet by the plaintiff. But this was not the consideration for the agreement. The consideration was the withdrawal from competitive purchasing, by which they were enabled to purchase all the lands cheaper than they might have otherwise done. This was in good faith fully carried out by the plaintiff. Withholding competition, when not opposed to public policy, is a sufficiently binding consideration: 6 Am. & Eng. Ency. of Law, 2d ed., 746. It is a supreme duty of a court of equity and conscience to prevent fraud: Browne on Statute of Frauds, sec. 448a, pp. 557, 571. "The fraud," says Judge Wells in *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, "most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance after the other party has been induced to make expenditures or a change of situation in regard to the subject matter of the agreement, . . . so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss. In such case the party is held by force of his acts . . . to be estopped from setting up the statute of frauds." The plaintiff in this case, by force of his agreement with Winchester, changed his situation with regard to the subject matter thereof, so that the refusal to enforce such agreement is the infliction of an unjust and unconscionable injury and loss upon him, in addition to the denial of rights which it was intended to confer. If the agreement had not been entered into, not only could plaintiff have purchased the Caperton lands, but he could also have purchased the Dewing lands, or forced Winchester to pay a much higher price therefor. Winchester, Hutton, and Butcher received the full benefit of the agreement with plaintiff; and if it had not been reduced to writing by Winchester, it could have been enforced against them, notwithstanding the statute

of frauds. They, however, neither deny it, nor in any manner resist it, for they ²¹⁴ have parted with all interest therein to Dewing & Sons. Hutton, holding the legal title to these lands, was undoubtedly trustee for plaintiff; and his conveyance to Dewing & Sons was a breach of trust, unless they succeeded to the trusteeship, as the trustee would have the right to withhold the title until the purchase money was paid, of which the purchaser is the trustee: 11 Am. & Eng. Ency. of Law, 2d ed., 181.

2. Is the proof sufficient to sustain the decree? Are Dewing & Sons innocent purchasers for value, or did they assume the trust undertaken by Winchester, or buy the lands with notice of the existence of such trust? Notice, to be sufficient, is such facts and circumstances as will put a person on inquiry: *Cain v. Cox*, 23 W. Va. 609. This is not a question of notice, but whether Dewing & Sons took the land subject to the trust that existed against them in the hands of their grantor. Winchester was the general agent for Dewing & Sons, and he, in conjunction with Hutton and Butcher, in accordance with their agreement with plaintiff, purchased the Gauley lands—not, apparently, in the beginning, for Dewing & Sons, but being authorized by Hutton to sell the land for not less than two dollars per acre, he made an arrangement with his principals, by which they ostensibly became the purchasers at the agreed price, but actually they were to have all the benefits to accrue to him from such purchase, in the full enjoyment of the profits which otherwise would be his alone. This at least was an after-ratification of all his acts and conduct in relation to such purchases. They could not possibly take the benefits of his purchases and not assume the liabilities thereof. Though he might not have been their agent in the beginning, he became so when they accepted the profits of his labor, which agency must extend back and include the inception of such labor; for they pay him only for his time and expenses and keep his earnings. Accepting the benefit, they must assume the liabilities; otherwise, they take from him the power to meet such liabilities, without recompense, and leave those to whom he is under obligation to bear the loss. If Winchester intended such a result, he would be guilty of fraud; and if they retained the fruits of such fraud after notice thereof, they ²¹⁵ would be *pari delicto* with him, and subject to the same legal responsibilities. Winchester says he is not guilty of fraud, for the

reason that when he permitted all the lands to be deeded to Dewing & Sons he had a perfect understanding with them, through William S. Dewing, that they were to assume all his legal obligations to the plaintiff. Butcher and Hutton corroborate him. William S. Dewing, enjoying the full benefits of the agreement with plaintiff, except Hutton's share thereof, and with Winchester's profits in possession, denies there was such an understanding at the time, and before he took the title to the lands. Here the oral proof is conflicting, with the preponderance, in number of witnesses at least, with plaintiff, and the circumstances strongly corroborative thereof. It is true that plaintiff has never paid any of the purchase money on the lands. Neither were the deeds ever executed and tendered to him nor a proper demand made for such purchase money. The evidence is very conflicting. The witnesses swear positively, and contradict each other directly. Either on one side or the other the witnesses are guilty of false swearing. Which side it is, it is not for this court to determine. The circuit court has found for the plaintiff. Its finding cannot be disturbed unless it has decided against the plain preponderance of the evidence. This has been held so often by this court that it seems almost useless to repeat it. The decree may be wrong, but we cannot say so. If we would disturb it, it would be only a matter of opinion, about which all reasonable men might differ. We cannot run the risk of doing a greater wrong to prevent a wrong that we cannot say exists. If the Dewings have set up a false plea of being innocent purchaser, to defeat the contract between plaintiff and Winchester, that they may enjoy the fruits thereof without compensation, the statute of frauds furnishes them no protection whatever. Having obtained the title through assurances that they would convey it to plaintiff, to allow them to hold it would be to permit them to take advantage of fraudulent conduct, against which equity always furnishes relief: *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *Potts v. Fitch*, 47 W. Va. 63, 34 S. E. 959. The law being against them on the facts as determined by ³¹⁶ the circuit court from the evidence, the decree must be affirmed.

THE CONSIDERATION IS SUFFICIENT to sustain the contract where two parties agree for their mutual advantage jointly to purchase a lot, one to have a portion thereof in consideration of his bidding off the lot: *James v. Fulcro*d, 5 Tex. 512, 55 Am. Dec. 743.

SPECIFIC PERFORMANCE.—THE CONSIDERATION of a contract necessary to sustain a suit for its specific performance may

consist either of some profit inuring to the promisor or some detriment sustained by the promisee: *Rector v. Wood*, 24 Or. 396, 41 Am. St. Rep. 800, 34 Pac. 18.

APPEAL.—WHERE THE EVIDENCE IS CONFLICTING, a judgment or verdict will not be disturbed on appeal: *Note to Alabama etc. Ry. Co. v. Bolding*, 30 Am. St. Rep. 545; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474.

CECIL v. CLARK.

[47 W. Va. 402, 35 S. E. 11.]

COTENANCY—ACCOUNTING FOR COAL TAKEN.—If one cotenant takes coal from the common property, without the consent of the other, the former thereby commits waste, for which he must account. He cannot avoid such accounting on the ground that the portion of the common property furnishing the coal is no more than his just share of such property.

COTENANT—EXCLUSION OF COTENANT.—If a cotenant in possession excludes his cotenant, he must account, although the tenant in possession does not take more than his just share of the rents and profits.

COTENANT IN POSSESSION, WHEN NEED NOT ACCOUNT FOR PROFITS.—If a cotenant in possession does not exclude his cotenant, but uses the land for a purpose legal between cotenants, he is not liable to account for the profits or proceeds of such use.

PARTITION—INTERLOCUTORY DECREE, EFFECT OF AS RES JUDICATA.—An interlocutory decree directing the partition of real property, and instructing the referees to assign to certain of the parties lands which they have mined, does not exonerate such parties from accounting for the proceeds of such mining.

J. S. Clark and A. W. Reynolds, for the appellants.

S. L. Flournoy, W. Mollohan, E. W. Wilson, and J. Osborne, for the appellees.

403 **BRANNON, J.** As will be seen in *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216, these cases have before been passed on in this court. That decision settled that the tract of land involved in this litigation was held by tenancy in common by certain trustees holding for the Flat Top Coal Land Association and Cecil and others, as heirs of Henley Chapman, and Sarah E. Torbett, as one of the heirs of Hall, the trustees owning five and one-half tenths thereof, the Chapman heirs four-tenths, and Mrs. Torbett, one-twentieth. The said trustees, claiming the entirety of the tract of land, and denying the Chapman and Hall heirs any right therein, took sole possession of the land, by leasing it for coal mining to the Elkhorn Coal

and Coke Company and the Shamokin Coal and Coke Company; and said lessees established an extensive plant and mined large quantities of coal, paying the said trustees, lessors, large sums of money as royalty, amounting, it is claimed, to \$135,406.27, up to September 5, 1895, the date of the decree holding said land to be such common property and subject to such partition. The said decree, after declaring the shares of the parties in the land, directed an account to be taken of the moneys received by said trustees as royalties prior to the date of the decree; and as to future royalties, it directed that said trustees pay into the Bank of Bramwell, to the credit of the causes, four-tenths and one-twentieth of all royalties accruing after September 5, 1895. At the instance of said trustees the clause requiring such payment into bank was suspended on the execution of a bond by the Flat Top Coal Land Company in the penalty of \$10,000; and said bond having been given, the said trustees continued to collect all the royalty. From the 5th of September, 1895, to April 9, 1898 (the later date being the date of the affirmance by this court of the said decree), the four-tenths and one-twentieth of said royalties going to the Chapman heirs and Mrs. Torbett, collected between said dates, amounted to \$23,267.41. After the 9th of April, 1898, the royalty going to the Chapman heirs and Mrs. Torbett was paid into said bank, and ^{and} amounted on the 27th of January, 1899, to \$5,335.67. On that date the court made a decree requiring the said bank to pay to a special receiver appointed by said decree (George E. Price) the said \$5,335.67, as also eighty per cent of any other sums which might thereafter be paid into said bank under said decree of September 5, 1895, and requiring said trustees of the Flat Top Coal Land Association to pay over to said special receiver \$18,264.41, which with \$5,000 left in the hands of said trustees to be thereafter disposed of, made up the \$23,267.41 collected by said trustees as aforesaid on account of the interests of the Chapman heirs and Mrs. Torbett in the royalties accruing between September 5, 1895, and April 9, 1898, as above stated. The said decree of the 27th of January, 1899, went on to direct that said special receiver pay out the said moneys to the Chapman heirs and Mrs. Torbett, thus finally adjudicating their right thereto against the said trustees for said land association. From this decree of January 27, 1899, the said trustees have taken this appeal. The moneys received by the said trustees prior to September 5, 1895, have not yet

been disposed of by the circuit court, but await the coming in of the account of rents and profits directed by that decree to be taken. Further, by that decree commissioners were appointed to make a partition of the land between the said tenants in common according to their respective rights, directing them to assign to said trustees their share in such manner as to include in their share the portion or portions of the tract on which they had made improvements, if the same could be done without injury to the other owners; and in case said portion of said tract embracing said improvements should be laid off to the trustees the commissioners were directed not to take into the estimate of value any improvement placed thereon by the trustees, nor deduct from the value of the portion assigned to said trustees anything on account of the coal mined therefrom, but to estimate the value of such portion at ⁴⁰⁵ such sum as would be done if such portion of the tract had in it the coal so mined therefrom.

The appellants complain of the decree because it orders a distribution of any part of the royalties paid since September 5, 1895, claiming that the court should have held all of the royalties subject to its disposal until the coming in of the report of the partition commissioners, and the report of the commissioner in chancery as to rents, royalties, and improvements, as required by the decree of September 5, 1895. The trustees claim that as they took possession and developed by coal mining certain parts of the land, they should be assigned their share of the land, so as to include the coal mines opened by them, and as this would not cover more than their share of the surface, and as all the coal sold by them came from that land, they should be allowed to retain the money from its sale, without accounting to the Chapman heirs and Mrs. Torbett for any part of that money, and that said heirs and Mrs. Torbett should be assigned their shares in the undeveloped land. The trustees base this position or claim on the well-established principle that, where one cotenant has made improvements upon a part of the common land, such improvements should be included in the land allotted to him in the partition, if the land is partible, and it can be done without injury to the rights of others, and the further principle, held in *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. 415, that when the nature of the property is such as to admit of its use by several, and less than his just share is used and occupied by one tenant in common in a manner which in no way hinders or excludes other tenants in common from in

like manner using and occupying their shares, such tenant does not receive more than comes to his just share and proportion, within the meaning of section 14, chapter 100, of the code, and is not accountable to his cotenants for the profits of that portion of the property occupied by him. But does this case fall under that statute? The position mentioned would, on first impression, seem to be reasonable, but I repeat the question, Does this case fall under that statute at all, or the decision in *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. 415? Instead of doing so, does it not fall under section 2, chapter 92, of the code, saying that "if a tenant in common, joint tenant, ⁴⁰⁴ or parcener commit waste, he shall be liable to his cotenants jointly or severally for damages?" The other statute (Code, c. 100, sec. 14) provides that "an action of account may be maintained . . . by one joint tenant in common against the other for receiving more than comes to his just share or proportion." These two sections are in the code. They do not mean the same thing. We must give each its construction. Where one cotenant occupies land for agricultural purposes in the production of yearly crops, fructus industriales, or other legitimate use for such a cotenant, it is plainly just that he be allowed to do so without accounting to his cotenant for such use, unless he occupies more than his share of the land; otherwise, he would not have the use of his share of the land. But if he excludes his fellow from like enjoyment of his share, he must account to his cotenant for that cotenant's share, whether the occupation covers more or less than the share of the cotenant so occupying. Or if he occupies more than his share, though he does not exclude his cotenant, thus not leaving open for his cotenant that cotenant's share for his enjoyment, he must account to him for taking more than his own just share of the profits. This liability to account did not exist at the common law. Use as much as he might, however profitable, one cotenant was not liable to account to another. But section 14, chapter 100, above quoted, changes this, by making him account for what is beyond his just share to his fellow. Its only purpose is to change the common-law rule of nonaccountability as to the ordinary use of the common property which a cotenant may legitimately make of it. Such legitimate use contemplated by that section does not waste the property by damaging the inheritance permanently, but leaves it after such use intact, uninjured, ready for partition, as before such use. That statute only says that if one cotenant, by such lawful use for ordinary purposes, get more than his fair share,

he shall account for the excess to him entitled to the excess. Such construction of this statute was given in *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, and *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, 21 S. E. 746. But that statute does not apply to this case. If it did, the position ⁴⁰⁷ of the trustees would be tenable, as it is clear that the trustees did not take coal from a greater quantity of land than their interest would call for; but that statute does not touch this case, since it relates to rents and profits only in ordinary cultivation or other use authorized by law to one tenant in common, while we are dealing with unauthorized use—with what is waste. Coal in place is a mineral, and part of the very substance of the land. As shown in *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, and 2 American and English Decisions in Equity, 670, taking from the land any mineral by a tenant in common is waste, for which he must account to his cotenant. He is liable under section 2, chapter 92, of the code, above quoted. That deals with waste by a tenant in common, changing the common law, which did not make him liable therefor: 2 *Minor's Institutes*, 429. The difference lies in the light in which the law views the act of production in the use of the common property—we may say, in the article produced. Where one tenant in common takes wheat or apples, even in excess of his share, the law regards him as its sole owner, his cotenant having no title therein, though the producing tenant is accountable for taking more than his just share. But when one takes coal, his cotenant has title to the very coal after its severance from the land, and the taking tenant can be sued in trespass, or, if he sells, his cotenant can waive the tort, and sue for the money had and received, because the one has received money from the sale of property belonging to the other. When the one took the grain he did so with lawful authority, as he was entitled to occupy the land for the production of grain. But when he took the coal, he did so without authority. His act was a wrong, a waste, in violation of the right of his cotenant; and this cotenant can follow up the property, and base his demand on its wrongful taking and conversion. The distinction is that one is waste, falling under a statute declaring, without qualification, that he who commits it shall answer, without any reference to whether he took more than his share or not, while the other is not waste, but authorized use, rendering him accountable, by the letter of the statute, only in case he takes more than his share. It does

not seem that in cases in Virginia where tenants in common took salt water, lead, or iron ore, ⁴⁰⁸ it was contended that they could keep all their proceeds, without account to their fellows, on the theory that what was taken was no more than their fair share, or that it came from the land assigned to them: *Ruffners v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; *Newman v. Newman*, 27 Gratt. 714.

As to the point made by counsel that the bill does not charge waste or go on that theory, I have to say that it does so in a legal point of view. It charges common ownership, and charges that the trustees took coal from the land; and that in law constitutes waste, and relief would come under the prayer of general relief.

Another reason against allowing the trustees to keep all the money arising from the coal without accounting to their co-tenants, on the theory that the trustees took no more than their lawful share, is that the trustees denied all title in the Chapman and Hall heirs, took sole possession, and excluded them from the land. Those trustees cannot say, or have the benefit of the theory, that they did not exclude the Chapmans and Halls, as they did not even concede their right when the Chapmans and Halls demanded a share in the land, but defended that suit through all the courts till the right of their adversaries was established. Therefore, if the taking of the coal is viewed, not as waste, but in the light of ordinary use for agriculture, and thus coming under section 14, chapter 100, of the code, still the trustees must account though they took less than their share, because of their exclusion of their co-owners: *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Rust v. Rust*, 17 W. Va. 901.

But the trustees, conceding for the moment that the case does not fall under chapter 100, section 14, and taking coal is waste, would fall back on a supposed general principle of equity, and say: "We have not occupied more land in mining than our share. All the coal taken by us came from the land occupied and improved by us, and as that land can and should be assigned to us in the partition, we consequently ought to keep the proceeds of the coal, without accounting for it to the Chapman heirs and Torbett; and they should be compelled to take their share in undeveloped land with its coal, which they may mine if ⁴⁰⁹ they choose." This does seem to be a strong proposition, but second thought presents a counter consideration over-

throwing its force. If the trustees keep all the money, they keep money actually realized from coal from a given area of land—a certainty. The Chapman heirs and Torbett have to look to a like quantity of land for a like quantity of coal, producing an equal amount of money—an uncertainty. Under this theory you call on equity to compel the Chapmans and Torbett to relinquish this money for what may not be realized. In the land undeveloped, which they would get, the coal may be less rich in quantity and quality. There is an element of hazard. In *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764, ante, p. 791, this court held that ownership in fee of natural gas and oil separate from the surface of the land is impartible, because gas and oil are fugacious, and no partition of them can be made, affording a reasonable guaranty of equality. While coal land or only the coal in land is more certain, and is partible, still there is an appreciable element of uncertainty touching it great enough to forbid a court of equity from depriving a party of his right in what is in the land for what may never be there.

It is said that the trustees are entitled to keep the coal money because the decree of September 5, 1895, is *res judicata* upon the question, and is violated by the decree of January 27, 1899. This calls upon us to construe the former decree. The clause above quoted from that decree directs the commissioners of partition to assign to the trustees their land, so as to include the land which they mined, if the same can be done without injury to other owners and in case the mined land shall be laid off to the trustees, nothing should be deducted from the value of that land for coal mined therefrom, but that they shall estimate the value at such sum as would be done if the land had in it still the coal taken therefrom. The trustees say that this provision finally gives and compels them to take the land exhausted by mining, and consequently lets them keep the money arising from the coal royalties, since it cannot be that the court intended to force the trustees to take exhausted land, without deducting the value of the coal mined, and also yield to the Chapmans and Torbett their ⁴¹⁰ share of the money. Can it be that the court intended the trustees to keep the money? If so, why does the decree order an account to be taken of what money had been received from the sale of coal before that decree, unless it was to charge the trustees, in favor of their cotenants, for their share of the money? Why the explicit expression of the opinion of the court in the decree as to money coming from coal sold after the decree that the Chapman heirs

and Torbett were entitled to shares therein? This opinion is expressed with an emphasis making it almost decretal in character. This opinion that the Chapman heirs and Torbett had specified interests in the moneys thereafter received is given as the reason for directing such moneys to be paid into the Bank of Bramwell by the lessees, by fractions corresponding to the shares of the Chapmans and Torbett therein. This negatives all idea that the court designed finally to adjudge that the trustees should retain all the money arising from the coal. If the court so designed, it would have allowed the trustees to continue to receive, as they had been doing, all the money, instead of allowing them to collect only their part thereof, and directing the part proper for Chapman and Torbett to be paid into bank. Indeed, rather can it be said that the decree decided that the money which should be deposited in bank should, if not at once, yet ultimately, go to the Chapmans and Torbett, because deposited as their shares, only to await final decree. The decree discloses that the trustees asked the court to suspend that clause of the decree directing payment into bank, in order to allow them to apply for an appeal, and this may be the reason why such deposit was directed. At any rate, we cannot construe the decree as giving the money to the trustees. It does not actually decree the money at once to the Chapmans and Torbett, but it says by way of recital, if you can call it recital: "And the heirs of Henley Chapman and William H. Allen being entitled to four-tenths, Sarah E. Torbett, the one-twentieth, of all royalties hereafter accruing"; and it directed the lessees to pay into bank, "to the credit of these causes, four-tenths and one-twentieth of all rents or royalties payable under said leases for coal, timber, and material taken from said tract from this day until the further ^{and} order of the court." As just stated, the decree does not purport to actually decree at once to the Chapmans and Torbett the money, but it repels the claim that the decree affirmatively holds that the trustees shall keep the money. The decree may not be said to establish beyond recall the right of the Chapmans and Torbett to the money, but it can be said that it repels any claim that it gave to the trustees that money irrevocably. Hence that clause is not violated by the subsequent decree actually directing the money to be paid to the Chapmans and Torbett. But is the clause of the decree directing the commissioners of partition to assign to the trustees the land which had been mined, without deduction from its value of the value of the coal taken from it, violated by the

later decree? That provision is not final, either that the developed land should go to the trustees or that it should go without deduction of the value of the coal mined therefrom. I understand that a decree for partition is final so far as it adjudicates the shares of the partitioners, but not as to the manner or mode of partition, or what land the parties shall severally take. That is for adjudication in the decree of final partition, and is not usual or practicable in the first decree, where a report of commissioners or the ascertainment of facts deforms the record is essential before final decree, as surely was the case in this instance. There could not possibly be a decree until after the commissioner's report. The clauses of the decree seem to be inconsistent; but that is no matter if the decree be not res judicata upon the question in hand, for any error or inconsistency is then afterward correctible. That clause directing the commissioners to include in the land assigned to the trustees the land which had been mined, without deduction for coal mined, but to estimate its value as if no coal had been mined is not final, but merely tentative or experimental—to be adopted or rejected as the court might thereafter determine. This must be so from the nature of the decree; it being not one of actual partition, but only one for partition—a decree preparatory to final actual partition. It is manifest such was the intent of the court, from the language that the land which had been mined should be assigned to the trustees “if the same can be done without injury ⁴¹² to the interests of other owners,” and that “in case said partition of said tract embracing said improvement shall be laid off to the trustees, the said commissioners shall not take into the estimate of its value any improvements placed thereon by said trustees, nor shall they deduct anything on account of the coal mined therefrom,” etc.

It is hardly necessary to say that as the Chapmans and Torbett have elected to participate in the money, the trustees cannot, in the partition, be given the exhausted land, without deduction of the coal taken from it. The Chapmans and Torbett cannot have their full proportionate share of the land, as if never mined, and money also. As to the argument that the court erred in giving the money to the Chapmans and Torbett prematurely before the coming in of the reports of partition and of rents and profits: It is said that whether the trustees shall be deprived of this money depends on the final determination of the question whether they took more than their just share, and that this can only be determined upon the final account; but we

hold that their accountability does not depend on that, but on the fact of waste. Having determined that the money goes to the Chapmans and Torbett, why withhold it longer from them? A large sum is in the hands of the trustees, received before 5th of September, 1895, in which the Chapmans and Torbett have a share, under principles above given; and that money has not yet been disposed of or passed on by the circuit court. This money is adequate to meet any demands for management or improvements, if any be allowed, and especially adequate in view of the fact that the improvements are mostly trade fixtures put up by the lessees, and removable by them, not belonging to the trustees, who receive net money for royalty. I see no reason for keeping the money passed on by the decree of January 27, 1899, any longer from the people entitled to it, seeing that it cannot be needed for any future purposes of the case.

As to the disposition of the moneys from royalties paid prior to 5th of September, 1895, or the mode of partition of the land: These subjects, not being before us, remain for the action of the circuit court, and we express no opinion ⁴¹³ thereon, further than as the legal principles above given may apply thereto.

The trustees claim that, as the husband of Mrs. Torbett is living, she is not entitled to her share of the money until his death, and that said trustees are entitled to its interest until his death, and that the decree erred in giving her her share at once. The former decision by this court settled that point in favor of the correctness of the subsequent decree as to it.

Affirmed.

COTENANCY—ACCOUNTING FOR RENTS AND PROFITS.—If a cotenant in exclusive possession commits any act which the other owners may deem an ouster, he becomes answerable to them for the use and occupation of their share of the property, and it is not material whether he makes profits or not: See the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 928. If, however, the possession of a cotenant is not tortious, it is essential that he take or receive more than his just share of the proceeds or products of the property, in order to render him liable to account to his cotenant: *Cain v. Cain*, 58 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278.

WASTE.—WHERE ONE TENANT IN COMMON OF A MINE is working it in the usual way, and not excluding his cotenants, he may not be called to account to them in an action as for waste: *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863. But see *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411.

MOORE v. MUSTOE.

[47 W. Va. 549, 35 S. E. 871.]

TRUSTS AND TRUSTEES.—TO CONSTITUTE A RESULTING TRUST arising out of a contract of purchase of land, the money of the cestui que trust must be used at the time of the purchase, or enter into the consideration therefor, or must thereafter be applied in pursuance of such purchase.

TRUSTS AND TRUSTEES—EXPRESS TRUSTS—ENFORCEMENT.—An express trust in lands may be enforced if the possession thereof is held by the cestui que trust, who makes valuable improvements on the lands in pursuance of a contract of purchase.

A. B. Parsons, for the appellant.

E. D. Talbott, for the appellees.

549 DENT, P. This is a suit from the peaceful shades of Randolph county, instituted by Clara, intermarried with Eli Moore, of Montrose, against her pa, the Reverend Anthony Mustoe, of Breitz, near the happy land of Canaan, the neighboring county of Tucker. Clara's story is as follows: Eli's creditors becoming importunate, he found it necessary to make an assignment for their benefit. In this assignment he included an item of five hundred dollars for her, which she had no knowledge of; also a note for six hundred and thirty dollars in favor of her pa, which, however, was to be for her benefit. The circuit court, on application of the other creditors, struck out the five hundred ⁵⁵⁰ dollar item, without resistance on her part, but allowed the six hundred and thirty dollars in favor of her pa, and decreed the lands of Eli for sale. That her pa agreed to purchase for her at such sale three certain tracts of land, and did purchase them, to wit, a seventy-six acre tract, at the price of two hundred and sixty-nine dollars; a seventy-five acre tract, at the price of two hundred and fifty-five dollars, and a one-half acre lot, at the price of two hundred and thirty-one dollars—aggregating seven hundred and forty-five dollars. On this amount the six hundred and thirty dollar note was to be credited, and the residue pa was to take in timber, tan bark, and rent. But he becoming, for some reason, dilatory, she decided pa must toe the mark. So she sought the aid of a court of equity to bring him to time and compel him to hand over the deed. Eli, like a faithful helpmeet, seconds her motion to the extent of his skill and ability. He says he knew creditors always wanted something to kick at, so he put in the five hundred dollar note

to furnish them the necessary exercise. The six hundred and thirty dollar note in the name of Clara's pa was a bluff note; but the old gentleman had, much to his surprise, called him one better, and got away with the whole of his frugal savings from his greedy creditors. A mere breach of trust, not fraud in law: *Currence v. Ward*, 43 W. Va. 368, 27 S. E. 329. Eli entered the contest badly disfigured. The backbone of his evidence had been broken by the obstruction put in its way in the execution of the deed of trust and the note under seal, solemn acts which cannot be easily explained away, and by which he is estopped from telling the truth—not a great hardship on Eli. In addition, a number of his neighbors, notably among them two of his brothers in law, pa's sons, who are in a position to know, say his reputation for truth and veracity is not the best, and they do not hesitate to declare that they would not believe him under oath. Pa certainly could not induce the boys to swear thus falsely for the purpose of cheating their sister, even though Eli intimated in his evidence that pa had been guilty of forging his valuable name to some small notes. It is due to Eli to say, however, that a greater number of his neighbors have absolute confidence in his capacity to tell the truth, because they ⁵⁵¹ do not know that he was ever caught in a lie. Pa Mustoe, with a few essential variations, tells about the same story as his dutiful children. He says he agreed to buy the lands in for Eli at the commissioner's sale on the representation by him that he had saved some money out of the assignment to pay for the same. After the lands were knocked down to him he told Eli to show up. Eli, instead of doing so, wanted him to give a note, and he would sign it, and raise the money in that way. But pa was too well acquainted with Eli's note-paying ability to be caught napping. So he told Eli he would raise the money to pay the down payment, and he could pay it back to him and meet the deferred payments, and then he could have the lands. Eli failed to meet the deferred payments, and the commissioner brought suit and obtained a new decree of sale, and pa Mustoe, having realized about three hundred and sixty dollars out of the six hundred and thirty dollar bluff note, raised the remainder, paid up the purchase money in full, and took a deed for the property. The evidence tends to show that while pa Mustoe does a little preaching, trying to gather the lost sheep into the fold, and has one eye on the pearly gates, where the wicked cease from troubling and the weary are at rest, he keeps the other to windward in an endeavor to make friends with the

Mammon of unrighteousness. While trying to serve two masters, he gives his present allegiance to the one he can see, taste, hear, feel, and smell, and puts the other off with a little preaching and the promise of a more convenient season. He says that he bought the lands for Eli, but several witnesses, bidders at the sale, say that he came to them during the bidding and persuaded them not to continue bidding against him, as he was buying the lands for his daughter Clara. And they stopped and let him have them, because there was a woman in it. He acknowledges that his son had him arrested and thrown in jail, like poor old Bunyan, charged with burning down his own barn. He has not money enough to furnish a good consideration for the bluff note, and admits that ninety-seven dollars and ten cents were paid him by Clara through Eli to go on the land. He appears to have stumbled onto the truth here, and afterward tries to correct himself, under the coaching ⁵³³ of his counsel. He is probably a little absent-minded. He makes a big effort to out-swear several other witnesses in the case. His attainments in this direction will hardly win him a crown as a faithful servant when he presents his credentials at the golden gate of the New Jerusalem. The Good Book saith there is a place without for whosoever loveth and maketh a lie, and they shall in no wise enter therein. Though his prospects for a mansion beyond are uncertain, he has possession and title to the lands here. He would rather dwell in the tents of the wicked than be a door-keeper in the house of the righteous. Equity never helps those engaged in fraudulent transactions, but leaves them where it finds them. Therefore, the money that Eli succeeded in bluffing his creditors out of must remain the money of his trusted father in law. He justly punishes Eli by keeping it. The fowler is caught in his own snare. He could not possibly permit his daughter to be the beneficiary of such a fraudulent transaction. It would not become a minister's daughter. So, he will just apply the money to the indebtedness of Eli, acknowledged by his note. With Clara it is somewhat different. She must suffer for the company she keeps. Yet the sins of both father and husband should not be imputed to her. Woman has always been a favorite with equity, and it always throws its willing arms around her to protect her from the importunity and duress of her impecunious husbands: See opinion of Judge Brannon in case of Schamp v. Security etc. Assn., 44 W. Va. 50, 28 S. E. 709. A resulting trust cannot be implied in her favor, for the reason that her money was not used at the time

of the purchase or entered into the consideration therefor. Nor was it paid thereafter in pursuance of such purchase: *Myers v. Myers*, 47 W. Va. 478, 35 S. E. 868; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644. Nor can the express trust be enforced so far as the two tracts of land are concerned, for the reason that her pa relies on the statute of frauds, and his contract with Eli was nothing more than an option withdrawable at any time before acceptance: *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923. When a man only preaches a little and undertakes to deal in the transitory things of this life, it is well always to have writings ⁵⁵³ with him, as memory is one of the worldly things that may be counted uncertain. It is not to be trusted, for it is easily overcome by self-interest. With the house and one-half acre lot it is different. She has been in continual possession thereof since the sale, claiming it as her own, and has put valuable improvements thereon. It is true pa says he advised her not to do so, through fear that she might not be able to pay the purchase money. In the light of the evidence pa cannot be believed unless he is corroborated. On this point he lacks corroboration. The boys were absent. Besides, he acknowledges, as heretofore shown, to having received the ninety-seven dollars and ten cents to be applied on his daughter's purchase. If pa is to continue preaching—and it is to be hoped, for from the conduct of this suit and the testimony of the witnesses Eli is not the only one in need thereof—he should cultivate a greater regard for the truth, and try to overcome his lust for the fleshpots of Egypt. It is bad advice that Stout sent to Eli to betake himself to a warmer country, and it is not wise for pa to take it. A rich man who chose a home there once sent back word, when he found the climate was sultry, the air impregnated with the fumes of brimstone burning, the society not select, and water scarce and more to be desired than the gold standard, that he longed for the companionship of poor Lazarus, to whom he had denied the crumbs that fell from his sumptuous table. He pleaded for a new trial and change of venue, which being refused, he asked that his brother be notified that the country was not a desirable place for a permanent location. Rather than accept Stout's advice, it had been better had he remained in jail until he mastered the Pilgrim's Progress, and learned how to get rid of the heavy loads which are preventing the full consecration of himself to his chosen calling, than which there is none higher. If he is going to

despoil anybody, it should not be those of his own household. With them, at least, he should be just.

As to this one-half acre lot pa must be held to be the holder of the legal title in trust for Clara: *Potts v. Fitch*, 47 W. Va. 63, 34 S. E. 959; *Camden v. Dewing*, 47 W. Va. 310, 34 S. E. 911, ante, p. 797. The decree complained of must therefore be reversed, and this cause is remanded to the circuit court, with direction to ⁵⁸⁴ secure to Clara, the wife of Eli, the legal title to the one-half acre tract, retaining thereon a lien for any unpaid purchase money if her pa exacts it, subject to the credit of ninety-seven dollars and ten cents, with interest and the costs of this suit, and any other just demand she may show herself entitled to, except the "bluff" money, which, if not really belonging to pa, coming from a corrupt source would pollute her otherwise chaste home. Reversed and remanded.

A RESULTING TRUST ARISES ONLY in favor of a party paying the consideration, or some part thereof, at the time of the purchase, where land is purchased and conveyance taken in another's name, and a subsequent payment will not suffice: *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88; *Beecher v. Wilson*, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209.

LEWIS v. CHESAPEAKE AND OHIO RAILWAY CO.

[47 W. Va. 656, 35 S. E. 908.]

CARRIERS—TERMINATION OF LIABILITY.—If a common carrier receives goods to be carried by it to a certain port and from there on to another place by steamship, and issues its bill of lading containing a condition that "this contract is executed and accomplished, and all liability thereunder terminates on the delivery of such property to the steamship, or to the steamship company, or on the steamship pier at such port," and after carrying the goods to such port it places it on its own pier under its own exclusive control and custody, without delivery or an offer to deliver, to the steamship company, its liability as a common carrier is not terminated.

CARRIERS—TERMINATION OF LIABILITY.—If goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier, and such intermediate carrier does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse or on his premises, without delivery or notice to, or any attempt to deliver to, the next carrier.

DEMURRER TO EVIDENCE.—If, on a demurrer to evidence, the evidence is such that the court ought not to set aside the verdict in favor of the demurree, the court should give judgment against the demurrant.

Simms & Enslow, for the appellant.

Flournoy, Price & Smith, for the appellee.

⁶⁵⁶ McWHORTER, P. On the first day of March, 1897, and on the eleventh day of the same month, C. C. Lewis shipped over the Kanawha and ⁶⁵⁷ Michigan Railway two carloads of lumber, consigned to E. D. Hotchkiss, Newport News, Virginia, to be shipped to Liverpool, England. Lewis sent the bills of lading issued by the Kanawha and Michigan Railway to Thurston Lewis, at Cincinnati, the agent of the Chesapeake and Ohio Railway Company, who issued foreign bills of lading over the Chesapeake and Ohio Railway and the Chesapeake and Ohio Steamship Company, Limited. One carload arrived at Newport News on the twelfth day of March, and the other on the thirty-first day of March, 1897. That arriving on the 12th of March was unloaded on the 19th of March, and the other was unloaded on the 10th of April, and the lumber piled on the pier of the Chesapeake and Ohio Railway Company at the place, to be delivered to the Chesapeake and Ohio Steamship Company. In the early morning of the 27th of April the pier took fire from the adjoining pier and the lumber was destroyed. Lewis brought his action of trespass on the case against the Chesapeake and Ohio Railway Company in the circuit court of Kanawha county for damages for the loss of the lumber. Defendant demurred to the declaration and each count thereof, in which plaintiff joined, and on being argued the court overruled the demurrer, to which ruling defendant excepted; but as defendant neither in its petition for writ of error nor in its brief adverts to the same, and as the declaration seems to be sufficient, it will be so regarded. On the 29th of March, 1899, a jury was impaneled and sworn to try the general issue of not guilty. When the evidence was all in the defendant demurred in writing to plaintiff's evidence, in which the plaintiff joined, and the jury returned a verdict, subject to the decision of the court on the demurrer, assessing the damages of plaintiff at the agreed sum of two hundred and seventy dollars and thirty cents in case the court should overrule the demurrer. On the 29th of March the court overruled the demurrer to the evidence and entered judgment upon the verdict. Defendant obtained from one of the judges of this court a writ of error and contends that

the court erred in not sustaining the demurrer to the evidence, for the reason that the stipulation in the bill of lading exonerated the company from liability from fire not caused by the carrier's negligence; and, second, ^{ess} "that the lumber was delivered at Newport News, and the bill of lading exonerates the company for any loss not occurring through its negligence after its delivery at the port for transshipment by the steamship company"; and, third, "that the stipulation provides that the company shall only be liable as warehouseman after it is placed in its warehouses or piers, and there was no negligence shown on the part of the company, and in fact it did not leave it to presumption, but the company showed by its testimony that it was not negligent." The clause in the bill of lading relied on by appellant to exonerate it for any loss in this case is as follows: "12. This contract is executed and accomplished and all liability hereunder terminates on the delivering of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company," and he cites *Texas etc. Ry. Co. v. Clayton*, 173 U. S. 348, 19 Sup. Ct. Rep. 421, in support of its position, the syllabus of which case is as follows: "The Texas and Pacific Railway Company received at Bonham, in Texas, four hundred and sixty-seven bales of cotton for transportation to Liverpool. It was to be taken by the company over its road to New Orleans, and thence to Liverpool, by a steamship company, to which it was to be delivered by the railway company at its wharf in New Orleans. Each bill of lading contained the following, among other, clauses: 'The terms and conditions hereof are understood and accepted by the owner, viz.: 1. That the liability of the Texas and Pacific Railway Company in respect to said cotton and under this contract is limited to its own line of railway, and will cease, and its part of this contract be fully performed, upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment, or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment, or loss.' The cotton reached New Orleans in safety, and was unloaded at the wharf, and the ^{ess} steamship company was notified; but before it was taken possession of by that company it was destroyed by fire at the wharf.

The owners in Liverpool having brought suit against the railway company to recover the value of the cotton, that company, on the facts detailed at length in the opinion of the court, contended that the cotton had passed out of its possession into that of the steamship company, or if the court should hold otherwise, that its liability as common carrier had ceased, and that it was only liable as a warehouseman. Held, that the goods were still in the possession of the railway company at the time of their destruction, and that that company was liable to their owners for the full value, as a common carrier, and not as a warehouseman." It is true in that case the decision seems to turn on the provision in the bill of lading that "that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment, or loss"; and the defendant had placed the cotton on its own wharf at the place of delivery to the steamship company, and had notified the latter company that the cotton was upon the wharf, ready for the steamship company to take it away, and made request that it be removed; but the company had not received it, and it was held to be in the actual custody of the defendant. And it is stated in the opinion in the case that: "It may be taken as established by the evidence that the cotton in question was for some days before the fire in a position on the wharf ready to be taken by the steamship company. So far as the management of the wharf and the protection of the cotton against fire were concerned, the evidence failed to show any negligence on the part of the railway company. The defendant moved for a verdict in its behalf upon two grounds: 1. The evidence showed a delivery to the connecting carrier before the fire occurred; 2. If no delivery took place before the fire, there had been a sufficient tender of the cotton to the steamship carrier, and thereafter, in view of the facts, the railway company should be deemed to have held it as a warehouseman, and as there was no proof of negligence, it was not liable for the value of the cotton." And it was held that defendant could not convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable excuse, to take them into its actual custody. "There is no room for the contention that the defendant had ceased to be a carrier, and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cot-

ton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it 'as soon as practicable' was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire."

It is contended by appellant in its brief that stipulation No. 12 in the through bill of lading "expressly provides that the contract of the Chesapeake and Ohio Railway Company is executed and accomplished when the lumber should be placed on the pier of the steamship company at Newport News, which was done." The pier upon which the lumber was placed was not the pier of the steamship company, but the pier of the defendant, entirely and wholly under its control and in its custody, and over which the steamship company had no control. The shipper, by this contract, was to understand that the steamship company had a pier at Newport News, under its control and custody, and that when his lumber should be placed on such pier it would be in the care of a reliable and responsible company. But it was not placed on the pier of the steamship company, but on the pier of defendant, and remained in its care and custody; and as held in *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318: "Public policy will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivering, or an attempt to deliver, to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and as not changing the nature of the bailment." In *McDonald* ⁶⁰¹ v. *Western R. R. Corp.*, 34 N. Y. 497, it is held: "When goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier beyond. An intermediate carrier in such case does not relieve himself from liability by simply unloading the goods at the end of his route, and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to, the next carrier": *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 398. Appellant did nothing to change its relation from that of carrier to warehouseman, although it is claimed that

delivery was made by placing the goods on its own pier, and yet retaining control and custody of it. The contract fairly bears the construction that the delivery was to be on the pier of the steamship company. If it were not intended to be so understood, clause 12 should have provided distinctly for delivery on its own pier, from which the steamship was loaded; and, even with such provision, it is very doubtful whether it could escape its liability as carrier. Such a provision, if held good, would place the shipper under the necessity of having an agent at the port to look after the reshipment of his goods, to pass them on to their destination. In this case the shipper lives and does business some four hundred or five hundred miles from the terminus of appellant's route, and it would be unreasonable to require him to look after the transfer of his goods. There was certainly no delivery of the goods on the pier of the steamship company at the port of Newport News. In *Berry v. West Virginia etc. R. R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143, it is held that "a contract or clause in a bill of lading limiting the liability of a common carrier or exempting it is valid, provided it is based on a valuable consideration, and does not so limit or exempt from liability or negligence of the carrier": *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *Brown v. Adams' Express Co.*, 15 W. Va. 812; *Zouch v. Chesapeake etc. Ry. Co.*, 36 W. Va. 524, 15 S. E. 185; 5 Am. & Eng. Ency. of Law, 298. There is nothing in the case at bar to show that there was any valuable consideration for any of the limitations or exemptions in favor of appellant, in the way of reduced freight or ^{cost} otherwise. Appellant cites and relies on *Railroad Co. v. Reeves*, 10 Wall. 176, *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695, and *Denny v. New York etc. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645. In all these cases the proximate cause of the loss of the goods was the result of the immediate act of God. In the first, an unexpected and unusual flood in the Tennessee river at Chattanooga, where the tobacco in question was caught by the waters in the defendant's cars. In the case of *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695, when the goods were being transported on a canal they were injured by the wrecking of the boat, caused by an extraordinary flood. And in *Denny v. New York etc. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645, while the goods were properly in the depot of the defendant at Albany, they were submerged by a sudden and violent flood in the Hudson river.

While appellant does not contend for it in its brief, in its petition for writ of error it seems to rely upon the eleventh clause of the bill of lading to give it the character of warehouseman after the lumber was placed on its pier at Newport News, which provision is that "no carrier shall be liable for delay, nor in any other respects than as warehouseman, while the said property awaits further conveyance; and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line, as above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamers of said line, or, if deemed necessary, by any other steamer." It appears, however, that two steamers of the line which was to carry the lumber left the port after the last car of the lumber should have arrived at the port. It was received by appellant on the 12th of March, and should have been at the port some days before the sailing of the "Kanawha," on the 24th of March, and was there some days before the departure of the "Rappahannock," on the 3d of April. Whether the lumber was forwarded "with reasonable dispatch" to Newport News (the last car being received on the 12th and reaching port on the 30th of March) was a fact for the jury to decide.

It is contended by appellee that the carrier, being bound at common law to forward the property intrusted to it, ⁶⁶³ with reasonable dispatch, on failure to do so is liable for its loss: *McGraw v. Baltimore etc. R. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696. The second clause in the bill of lading recognizes this obligation when it provides that "no carrier is bound to carry said property by any particular train or vessel or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit"; and it is claimed to be shown by the evidence that defendant was guilty of most culpable and inexcusable negligence and delay in forwarding this lumber. By defendant's witness, C. E. Doyle, it is shown that three or four days are considered a very good time on coal from the coal territory up here to Newport News, and the class of freight in question would be about the same. One of the cars was shipped on the first day of March, and the other the tenth day of the same month. The property was destroyed by fire on the twenty-seventh day of April, one carload having been in the custody of the defendant fifty-seven days and the other forty-seven days before it was burned. The first car reached

Newport News March 12th. The second car, instead of reaching the port by the 16th of March, was not received there until the 30th of March. It appears from the evidence that the steamship company had at that time three steamers plying between Newport News and Liverpool—the “Kanawha,” “Rappahannock,” and “Shenandoah.” The first left Newport News for Liverpool on March 24th, and it is contended by appellee that, if the appellant had forwarded the lumber with reasonable dispatch, both cars would have been at Newport News in ample time to be loaded upon that vessel, as one car had already been there twelve days before the sailing of the “Kanawha,” and the other had been twelve days in the custody of appellant, while reasonable dispatch only requires three or four days for it to reach the port. The “Rappahannock” sailed from Newport News April 3d, and yet it was not shipped on that vessel. Appellant introduced evidence tending to show that the cargo of the “Rappahannock” had been made up some three weeks or more before she sailed; but the witness, H. C. Blackiston, who said that the cargo of the “Rappahannock” was made up by freight that had been brought prior to March 18th or the 12th of March, and ⁶⁸⁴ that they got the information of the shipment of the two carloads on the 20th of March, and that the lumber was allotted to the “Shenandoah,” which should have been at Newport News on the 18th of April, but which did not arrive until the 27th of April, on cross-examination said they practically cleaned up all the Liverpool freight that was available for shipment at that time; that there was very little left when she sailed, if anything. Whether there was negligence on the part of appellant was a question for the jury, under all the evidence in the case. “If the evidence is such that the court ought not to set aside the verdict of a jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant”: *Heard v. Chesapeake etc. Ry. Co.*, 26 W. Va. 455; *Fowler v. Baltimore etc. R. R. Co.*, 18 W. Va. 579. The judgment of the circuit court is affirmed.

CONNECTING CARRIERS.—THE LIABILITY of a connecting carrier does not begin and the duty of the first carrier is not complete until there has been an actual delivery to the connecting carrier: *Vannatta v. Central R. R. Co.*, 154 Pa. St. 262, 35 Am. St. Rep. 823, 28 Atl. 384. The first carrier will not be relieved from liability as a carrier by merely storing the freight in his warehouse at the end of his line; he can escape liability only by actually delivering it to the succeeding carrier, or by at least giving notice to him: See the monographic note to *Wells v. Thomas*, 72 Am. Dec. 237.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

FITZGERALD v. WALSH.

[107 Wis. 92, 82 N. W. 717.]

ARCHITECTS—CONTRACTS—NEW PLANS.—Where an architect, who has made complete plans and specifications for a building to be erected on another's property, which plans are accepted, subsequently accepts orders for a second set of plans, nothing being said about compensation therefor, such acceptance constitutes a new contract having no relation to the work under the first contract, and for the performance of which the architect may recover compensation.

MECHANIC'S LIEN—WHEN ATTACHES—COMMENCEMENT OF WORK.—Under the statutes of Wisconsin, the right to a lien for work done in the construction of a building is not dependent upon whether a building is actually constructed, but upon whether such construction is commenced. If construction is commenced and lienable work is done in aid thereof, the right of lien thereby becomes perfect and cannot thereafter be defeated by any act of the proprietor.

MECHANIC'S LIEN—ARCHITECT'S PLANS—COMMENCEMENT OF WORK.—Where the construction of a building is actually commenced according to plans and specifications furnished by an architect and accepted, the architect has a right to a lien for his plans, although the use of them is abandoned before anything is done other than the commencement of the excavation for the basement.

MECHANIC'S LIEN—COMMENCEMENT OF WORK—EXCAVATION.—The commencement of the excavation for the basement of a building is the commencement of the building within the meaning of a mechanic's lien statute, and there is a building within the meaning of such statute, and lienable claims will attach to the property.

Timlin, Glicksman & Conway and Nathan Glicksman, for the appellant.

J. M. Clarke and P. J. Somers, for the respondent.

24 **MARSHALL, J.** Three questions are presented for consideration on this appeal: 1. What was the indebtedness of defendant to plaintiff for the work rendered by the latter mentioned in the complaint? 2. Is an architect entitled to a lien, under section 3314 of the Statutes of 1898, for compensation for making plans, specifications, and estimates for a contemplated building upon the land of another, if the construction of the building, pursuant to such plans, be commenced, though the use of them be abandoned before anything is done except a part of the excavating for the basement? 3. Was the construction of the building commenced according to the plans and specifications furnished by plaintiff?

1. Appellant's counsel contended that, respondent having agreed in writing to make plans and specifications for the building and to superintend its erection for the stipulated price of one thousand dollars, an express contract was necessary to give him a legal claim upon the appellant for services rendered **25** without objection, not included in such contract, basing such contention on the rule governing the relations of master and servant and that between an officer of a corporation and his principal in regard to personal services. Such rule does not apply to a situation of the kind in question. It is well settled that where a builder is ordered to make changes from the original contract plans, which are really extras, or to do work in some way connected with the original contract but substantially independent of it, and the circumstances are such that the proprietor must know that the execution of such orders will cause extra labor and expense to the builder not contemplated by either party in the original contract, he is liable to compensate the builder therefor in the absence of some express provision in such original contract to the contrary. The rule is stated in 1 Hudson on Building Contracts, second edition, 358, citing *Gibbons v. United States*, 15 Ct. of Cl. 174, thus: "Where a change in the contract is ordered amid circumstances which imply or warrant the belief that no extra cost will result from the change, it is the duty of the contractor to notify the other party that he cannot make the change without extra price. But where a change is ordered which must necessarily cause increased expense, no such notice is necessary." Such work cannot be said to have been in contemplation by the parties at the time of making the contract for the construction of the building. There was no meeting of minds on that subject. So the doing of such work when ordered, without objection, cannot reason-

ably be said to be voluntary and without expectation of compensation if the expense to the builder is thereby necessarily materially increased. In such circumstances an implied promise arises to pay for the extra or independent work, in the absence of anything in the contract to the contrary: *Boody v. Rutland etc. R. R. Co.*, 24 Vt. 660, 665; *Wait on Engineering and Arch. Jur.* 490; *Escott v. White*, 10 Bush, 169.

Now, the trial court found, on such evidence, that the finding ²⁸ cannot be disturbed that respondent, pursuant to his contract with appellant, made complete plans and specifications for a building to be erected on appellant's premises, and that they were accepted. That branch of the contract was thereby fully executed. Respondent did not agree to make all plans and specifications appellant might order in contemplation of the construction of a building, but to make plans and specifications for the proposed building. The only reasonable, sensible construction of that language is that it called for one set of acceptable plans and specifications. That being satisfied, the acceptance of an order for another set was neither within nor a mere extra incidental to the original contract.

The accepted order for the second set of plans was rightly decided by the trial court to constitute a new contract having no relation to the work under the written contract, and not governed thereby except as to the price for the new work. Nothing having been said about compensation therefor, it was fair to presume, as the trial court did, that both parties contemplated that it would be paid for at the same rate as the original work of the same nature, called for by the writing.

It is considered that there were two separate and distinct contracts in this case as plainly as there was in *Hand v. Agen*, 96 Wis. 493, 71 N. W. 899. The first contract, exclusive of the work of superintending the construction of the building, having been fully executed, the rule announced in *Boody v. Rutland etc. R. R. Co.*, 24 Vt. 665, applies: "Where the parties [under a special contract] deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as a work wholly extra, out of the scope of the contract, and may be recovered for as such."

We do not understand that, conceding the above theory ²⁹ to be correct, it is claimed that the amount of the indebtedness of appellant to respondent was placed too high by the trial

court. In any event, the finding in that regard is well supported by the evidence.

2. The right to a lien, under chapter 143 of the Statutes of 1898, for work done in the construction of a building, is not dependent upon whether a building is actually constructed, but upon whether such construction is commenced. If the latter circumstance occur, and lienable work be done in aid thereof, the right of lien thereby becomes perfect and cannot thereafter be defeated by any act of the proprietor. The language of section 3314 is that the lien for work done in the construction of a building shall be prior to any other lien which originates subsequent to the commencement of such construction. Section 3321 provides for joining in one action all claims on the property affected. Section 3324 provides that the judgment shall direct a sale of all the right, title, and interest which the owner had in the property at the time of the commencement of the work. And section 3325 provides for the distribution of the proceeds of a sale made pursuant to the judgment, among all the lien claimants without priority, clearly indicating that, without reference to when the indebtedness of the respective lien claimants on the same property accrued, if there be several and the liens be for work done or material furnished in the construction of a building, they shall all attach at the same time; that is, at the time of the commencement of the construction. That was decided to have been the legislative intention in *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 51 Am. St. Rep. 925, 65 N. W. 488, where it was held that the right of lien for machinery manufactured and furnished for a sawmill after the commencement of the construction of the mill building, related back and attached to the property at the time of the commencement of such construction, regardless of when work commenced on the machinery at the factory or when it was attached to such building, and took precedence ⁹⁸ of a mortgage placed on the property in the meantime.

Statutes similar to ours exist in Indiana, Kansas, Maryland, New Jersey, and other states, and have been construed there as in *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 51 Am. St. Rep. 925, 65 N. W. 488, the courts in some instances remarking that such statutes evidence the intent indicated so plainly as to leave no room for judicial construction: *Kansas etc. Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153.

So these two things only are necessary to respondent's right of lien: indebtedness of appellant to him for work done, that

appellant knew or ought to have known respondent supposed was on account of a building to be presently, or in the near future, constructed, and the commencement of such construction. If the construction of the building the plans were made for was actually commenced, according to such plans, the lien then attached and could not thereafter be defeated by any act on the part of appellant. The principle applies, that if a person sell material for use in the construction of a building, and such construction be commenced so that a lien may attach to the property, the seller is entitled to his lien thereon, whether such material be actually used in the building or not: *Eeslinger v. Huebner*, 22 Wis. 632; *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277. That is in perfect harmony with *Foster v. Tierney*, 91 Iowa, 253, 51 Am. St. Rep. 343, 59 N. W. 56, relied upon by appellant. The trouble there was that the construction of the building was not commenced, so the lien, necessarily, could not attach.

3. There is left to be considered the question of whether the building was commenced pursuant to accepted plans furnished by respondent. We use the term "accepted plans" only because such plans were essential under the contract to entitle respondent to compensation for his work. On the subject of this last question, we cannot say the finding of the trial court is against the clear preponderance of the evidence. The commencement of the excavation was the ^{so} commencement of the building within the meaning of the statute. There is abundance of evidence of that having occurred after the plans were accepted and before respondent was notified that they would not be used. Commenting on statutes similar to ours, and quoting from judicial authority, it is said in *Jones on Liens*, section 1309b: "The foundation of a house or barn constitutes a building within the meaning of the statute giving a mechanic's lien upon a building and upon the lot of land upon which it stands. It is immaterial that the building was never erected or was never completed, or that the purpose to erect it was abandoned. Laborers and materialmen who are employed to do work or furnish material, with the purpose of the employer, then formed, to continue the work to the completion of a building for which the foundation is thus being prepared, are entitled to acquire a lien under the statute." In *Brooks v. Lester*, 36 Md. 65, it was said that the commencement of a building "is some work or labor on the ground. . . . such as beginning to dig the foundation, or work of like description, which everyone can readily

see and recognize as the commencement of a building." In *Mutual Ben. etc. Ins. Co. v. Rowand*, 26 N. J. Eq. 389, the following language was used: "The legislature intended to make the actual and visible commencement of the building notice to all who might propose either to purchase or acquire liens upon the property. . . . The excavation for the foundation is such notice." To the same effect are *Thomas v. Mowers*, 27 Kan. 265; *Pennock v. Hoover*, 5 Rawle, 291; *Scott v. Goldinghorst*, 123 Ind. 268, 24 N. E. 333; *McCristal v. Cochran*, 147 Pa. St. 225, 23 Atl. 444.

In the last two cases cited it was held, in effect, that if the excavation for the foundation be commenced, the building is commenced, and there is a building within the meaning of the lien statute, and lienable claims will attach to the property and remain liens thereon till discharged by failure ¹⁰⁰ of the lien claimants to enforce them, or by payment thereof.

Guided by the foregoing, the finding of the court that the building which the plans in question were made for was commenced pursuant thereto was based on the following: Plaintiff testified that he delivered the completed plans and specifications to Mr. Walsh, who thereafter had them at his office and used them in negotiating with contractors. There was evidence tending to show that a Mr. Shea was employed by Walsh to make the excavation; that Shea obtained from his employer a section of the plans and delivered it to the city engineer for use, and that it was used by such engineer in setting the stakes to indicate the boundaries of the foundation; that the engineer afterward did his work over at the special request of Walsh, who furnished him a section of the plans; that such section was delivered by the engineer to Fitzgerald; that Walsh subsequently called on Fitzgerald for that part of the plans; that Shea did over one thousand yards of the excavating work, largely, if not all, prior to January 21, 1899; that on such day Walsh sent the plans back to Fitzgerald, indicating that he did not intend to make any further use of them; and that such event was preceded, by a few days only, by a rupture between Walsh and Fitzgerald, and a refusal by the former to pay the latter anything on account of his work, and the employment by the latter of attorneys to seek redress in the courts.

In view of that state of the record, we cannot say the trial court was not warranted in deciding that the building for which the respondent prepared the plans and specifications was actually commenced, and that his right of lien attached to the im-

provement, as a building, in contemplation of the lien statute, and to all the right, title, and interest of the owner at the time of the commencement of the construction of such building, which could not thereafter be extinguished ¹⁰¹ by any act of the appellant except by payment of the claim.

The foregoing renders it unnecessary to consider any other question presented by the appellant. It requires the affirmance of the judgment appealed from.

By the Court. So ordered.

MECHANIC'S LIEN—UNCOMPLETED BUILDING.—A statute giving a lien upon a building and the land upon which it stands for labor done or materials furnished creates a lien, where the foundation of the building is commenced but not completed and the work is then abandoned: *Baker v. Waldron*, 92 Me. 17, 69 Am. St. Rep. 483, 42 Atl. 225. See, further, the monographic note to *Goodman v. Baerlocher*, 43 Am. St. Rep. 900-906.

MECHANIC'S LIEN.—AN ARCHITECT who prepares the drawings, plans, and specifications for a building, and superintends the construction thereof, has a lien thereon under the mechanic's lien statutes: *Hughes v. Torgerson*, 96 Ala. 348, 38 Am. St. Rep. 105, 11 South. 209. But see *Mitchell v. Packard*, 168 Mass. 467, 60 Am. St. Rep. 404, 47 N. E. 113. However, an architect who prepares plans and specifications for a building that is not erected, or an improvement that is not made, is not entitled to a mechanic's lien therefor, although he does some work upon the land needed for information in preparing his plans: *Foster v. Tierney*, 91 Iowa, 253, 51 Am. St. Rep. 843, 59 N. W. 56.

SEGNITZ v. GARDEN CITY BANKING AND TRUST CO.

[107 Wis. 171, 83 N. W. 327.]

ASSIGNMENT FOR BENEFIT OF CREDITORS.—A VOLUNTARY COMMON-LAW ASSIGNMENT for the benefit of creditors, good in the state where made, carries title to personal property, wherever situated.

ASSIGNMENT FOR BENEFIT OF CREDITORS—BANKRUPT LAW—CONFLICT OF LAWS.—A statute relating to assignments, which enables the assignor to obtain a discharge from his debts and provides that every creditor, within or without the state, who should accept a dividend out of the assigned estate, or participate in any way in the proceedings, should be bound by the order of discharge, subject to the right of appeal, partakes of the character of a bankrupt law, and such an assignment is ineffectual to transfer title to property of the insolvent situated in other states, at least as against creditors in those states.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FOREIGN—RIGHTS OF CREDITORS—CONFLICT OF LAWS.—Where a corporation organized in one state but having its principal place of

business in another state, makes an assignment in the latter state under a statute which enables it to obtain a discharge from its debts, such assignment does not transfer title to property situated in the former state, and a creditor located there is not estopped from acquiring title to the insolvent debtor's property in that state by the fact that he subsequently filed a claim for the balance due him in the assignment proceedings, because the filing of such claim is merely a recognition of the validity of the assignment so far as it conveys property in the state of the assignment.

ASSIGNMENT FOR BENEFIT OF CREDITORS—MEANING OF "PERSON."—In a statute providing that "any person" may make a voluntary assignment for the benefit of creditors, the word "person" should be construed to include corporations, where other state statutes provide that in the construction of statutes the word "person" may extend and be applied to bodies politic and corporate as well as to individuals.

Krull & Volger Company was a corporation existing under the laws of Illinois, with its principal place of business in Milwaukee, Wisconsin, and in June, 1898, made a formal voluntary assignment under the Wisconsin laws. This corporation had on deposit with the defendant in Chicago sixteen hundred and fifty-two dollars and thirty-nine cents, and was also indebted to the defendant on two promissory notes of one thousand dollars each. Defendant, after being notified of the assignment and of the fact that the assignee claimed the deposit, applied such deposit to the payment of the notes. Thereafter defendant filed its claim for the balance due it, in the assignment proceedings in Milwaukee. Defendant refused to pay the deposit to the assignee.

McElroy & Eschweiler and F. C. Eschweiler, for the appellant.

Winkler, Flanders, Smith, Bottum & Vilas and E. P. Vilas, for the respondent.

¹⁷³ **BARDEEN, J.** The complaint shows that a corporation organized under the laws of Illinois, with its principal office and place of business in this state, made a voluntary assignment for the benefit of its creditors in this state. The question for decision is whether such assignment carried title to ¹⁷⁴ the personal estate of the assignor situate in Illinois. The general proposition may be stated that a voluntary, common-law assignment for the benefit of creditors, good in the state where made, carries title to personal property, wherever situated. This court has so held, and such holding is supported by the great weight of authority: *Mowry v. Crocker*, 6 Wis. 326; *Cook v. Van Horn*, 81 Wis. 291, 50 N. W. 893; *Campbell v. Colorado etc. Iron Co.*, 9 Colo. 60, 10 Pac. 248; *First Nat. Bank v. Walker*, 61 Conn.

154, 23 Atl. 696; *Walters v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607; *Miller v. Kernaghan*, 56 Ga. 155; *Coffin v. Kelling*, 83 Ky. 649; *In re Paige etc. Lumber Co.*, 31 Minn. 136, 16 N. W. 700; *Askew v. La Cygne Exch. Bank*, 83 Mo. 366, 53 Am. Rep. 590; *Frazier v. Fredericks*, 24 N. J. L. 162; *Ackerman v. Cross*, 40 Barb. 465; *Noble v. Smith*, 6 R. I. 446; *Gregg v. Sloan*, 76 Va. 497; *Weider v. Maddox*, 66 Tex. 372, 59 Am. Rep. 617, 1 S. W. 168; *Black v. Zacharie*, 3 How. 483; *Van Wyck v. Read*, 43 Fed. 716; *Means v. Hapgood*, 19 Pick. 105; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312. In Illinois, Louisiana, and Maine, and possibly some other states, the rule is limited, and will not be allowed to prevail as against creditors of the assignor residing in those states: *Heyer v. Alexander*, 108 Ill. 385; *Beirne v. Patton*, 17 La. 589; *Fox v. Adams*, 5 Me. 245; *Chafee v. Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345. The general rule, however, is as above stated; and if the assignment in question, under the law of this state, was but a common-law, voluntary assignment, it carried title to the assignor's property in Illinois, and the demurrer was improperly sustained.

The assignment under consideration was made June 3, 1898, and the law applicable thereto may be found in chapters 80 and 80a of Sanborn and Berryman's Annotated Statutes. So far as chapter 80 is concerned, it only assumes to regulate and control the manner in which such assignments shall be made and executed. Chapter 80a, however, added some new features, which led this court to speak of our whole system relating to voluntary assignments as an insolvent law: *Holton v. Burton*, 78 Wis. 321, 47 N. W. 624; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31. In ¹⁷⁵ *Binder v. McDonald*, 106 Wis. 332, 82 N. W. 156, this court criticised these statements, and limited them to the additions made to the general assignment law by the acts of 1889, now included in chapter 80a.

This court has never had occasion to examine and construe the purpose and force of those features of our assignment law which enable the debtor to obtain a discharge from his debts. A very similar system in Minnesota was considered in *McClure v. Campbell*, 71 Wis. 350, 5 Am. St. Rep. 220, 37 N. W. 343, and it was distinctly held that an assignment made in that state pursuant thereto had no extraterritorial effect. Similar statutes have been the subject of frequent discussion in other courts, and the almost uniform line of decisions is in accord with the conclusion stated. Many of the cases are cited and reviewed by the supreme court of the United States in the recent case of

Security etc. Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. Rep. 545. In *Barth v. Backus*, 140 N. Y. 230, 37 Am. St. Rep. 545, 35 N. E. 425, and *Townsend v. Coxe*, 151 Ill. 62, 37 N. E. 689, the courts of last resort in New York and Illinois had occasion to consider the law of this state, and the legal effect of an assignment thereunder; and both courts came to the conclusion that those portions of our law which enable the assignor to obtain a discharge from his debts gave it the character of a bankrupt law, and that such an assignment was ineffectual to transfer title to property of the insolvent situate in those states. Of course, we are not bound by those decisions; but, in so far as they rest upon valid reasons and sound conclusions, they are entitled to weight.

Chapter 80, as already noted, only assumes to deal with the making and administration of common-law assignments. Prior to 1889 an insolvent debtor could only obtain a discharge from his debts by procedure under chapter 179—an act entirely independent of the assignment statutes. This chapter provided for a petition, a schedule of all creditors, and an inventory of property, and, in a proper case, an assignment was directed. Recognizing the futility of such a course ¹⁷⁶ by a debtor who had made a voluntary assignment, in 1889 the legislature adopted the provisions which have been incorporated into chapter 80a. The form of procedure was based upon the assumption that the debtor had made a voluntary assignment. Among other features, it provided that such debtor might become discharged from his debts, as a part of the proceedings under the assignment, and that every creditor, residing within or without the state, who should accept a dividend out of the assigned estate, or participate in any way in the proceedings, should be bound by the order of discharge, subject to the right of appeal. If this coercive feature of the scheme had been contained in the original assignment executed by the debtor, it would have rendered the assignment void. It became legal only by force of the statute. Thus, the way was opened to every debtor making an assignment, not only to distribute his property to his creditors, but to demand a discharge from his indebtedness as to every creditor who should come in or accept a dividend. It was, in legal effect, tacking a bankrupt law to the assignment law; and inasmuch as the distribution of the estate depends, not upon the will of the assignor, but upon the positive requirement of the law-making power, we can see no escape from the conclusion that in so far it becomes statutory, and not voluntary.

It is only in the cases where the making of the transfer and the distribution of the assigned estate are the voluntary acts of the assignor that the law recognizes the extraterritorial effect of the deed of assignment. When the state steps in and regulates the distribution of the assigned estate in accordance with conditions which only the sovereign can prescribe, and the conditions so prescribed are such as to bring into play the essential features of a bankrupt law, the operation of the assignment will be limited to the state where made. No question of comity arises, or, at least, that rule cannot be extended to cases of this kind. We are satisfied ¹⁷⁷ with the proposition that when this assignment was made the bankrupt features of our law were in force and the deed of assignment did not carry title to the personal assets of the assignor in Illinois—at least, not as against creditors residing in that state. Such being the case, the defendant had a right, after the assignor's notes became due, to apply the money in its hands, pro tanto, to their satisfaction.

The fact that the defendant subsequently filed a claim for the balance due, in the assignment proceedings, cannot affect the question. The legal effect of the assignment being only to convey to the assignee the title to such assets as were within this state, the filing of a claim by the defendant only has the effect to recognize its validity to that extent. It creates no greater right in the assignee than was conveyed by his deed. We do not see how any question of estoppel can arise, unless it should arise over some question of administration of the estate actually assigned. Whether the court in which the proceedings are pending may deny the right of defendant, under the circumstances, to participate in dividends, is a question not before us.

What has been said has been based upon the assumption that the words "any person," used in section 1702d, chapter 80a, Sanborn and Berryman's Annotated Statutes, may be construed to cover a corporation. This section reads as follows: "Any person who shall have made a voluntary assignment for the benefit of his creditors under or in pursuance of the laws of this state may be discharged from his debts as a part of the proceedings under such assignment, upon compliance with the provisions of this act." Glancing at the following sections of the act, it seems at first as though it was not intended that it should cover corporations, but a consideration of other statutory provisions in connection with several decisions of this court relieves the question of the seeming difficulty. The right of

a corporation to make a voluntary assignment is established: *Garden City etc. Co. v. Geilfuss*, 86 Wis. 178 612, 57 N. W. 349; *Vanderpoel v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601, 35 N. E. 932. In the construction of statutes, it is provided by subdivision 12, section 4971, of *Sanborn and Berryman's Annotated Statutes*, thus: "The word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." Subdivision 2, section 4972, says: "The word 'person' should extend and be applied to bodies corporate, unless plainly inapplicable." Instances where the word "person" has been construed to include corporations can be found in the following cases: *Chippewa Valley etc. R. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 253, note, 43 N. W. 950, 44 N. W. 515; *Fadness v. Braunborg*, 73 Wis. 279, 41 N. W. 84; *Larson v. Aultman etc. Co.*, 86 Wis. 286, 39 Am. St. Rep. 893, 56 N. W. 915. In view of the statutes mentioned, and the decisions of this court thereunder, we are satisfied that there is nothing in chapter 80a which indicates that there was any legislative intent to make them "plainly inapplicable" to bodies corporate.

It follows, therefore, that the order appealed from is proper, and ought to be affirmed.

By the Court. So ordered.

ASSIGNMENT FOR CREDITORS—CONFLICT OF LAWS.—A voluntary common-law assignment for the benefit of creditors, if valid where made, is valid in another state as against a creditor nonresident of the latter state who has levied an attachment on property in the possession of the assignee under the authority of such assignment: *Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106. A voluntary assignment in one state for the benefit of creditors operates to convey personal property, not already subject to liens, in every state where it may be found: *Fenton v. Edwards*, 126 Cal. 43, 77 Am. St. Rep. 141, 58 Pac. 320.

AN ASSIGNMENT BY A FOREIGN CORPORATION, for the benefit of creditors, conveys all its property to the assignee, including a debt due to it from residents of this state: *Fenton v. Edwards*, 126 Cal. 43, 77 Am. St. Rep. 141, 58 Pac. 320.

JOHNSON v. JOHNSON.

[107 Wis. 180, 83 N. W. 291.]

DIVORCE—CRUEL AND INHUMAN TREATMENT.—The fact that a husband is of a sullen, morose, and fretful disposition, making him a very uncompanionable man with whom to live, does not constitute cruel and inhuman treatment practiced by other means than by acts of personal violence, within the meaning of a statute permitting divorce for such cause, where the only intimation in the evidence that it was unsafe for the wife to live with her husband was that she brooded over her troubles until she became very nervous, and that she took medicine for such nervousness, but that otherwise her health was good.

DIVORCE—COSTS AGAINST WIFE.—In a divorce proceeding, where the husband prevails against his wife, she having separate property or a separate income, costs may be awarded against her.

Suit for divorce by a wife against her husband. On appeal, the court having remanded the cause with direction to dismiss the complaint, the clerk refused to tax costs in favor of the husband, on the ground that the wife was not liable therefor. Upon review, the court reversed this ruling of the clerk, and he was directed to tax costs for the husband.

Christian Doerfler, for the appellant.

Orren T. Williams and L. M. Ogden, for the respondent.

¹⁸⁹⁷ CASSODAY, C. J. This is an action for a divorce, commenced June 6, 1898. Issue being joined and trial had, the court found as matters of fact, in effect, that the plaintiff and defendant intermarried at Milwaukee, December 27, 1894; that they lived together as husband and wife in Milwaukee until June 28, 1896, when the plaintiff left the defendant, and since that time has not lived with him as husband and wife; that no child was born as the issue of such marriage; that the plaintiff has some property in her own right, and is heir to an interest in her father's estate; that during most of the time she so lived with the defendant she furnished the house in which they lived, and much of the furnishings thereof, and during several months of that time furnished all the money for the support of the family, including the defendant; that during that time the defendant directly or indirectly made application to the plaintiff for money to be invested in some business enterprise or scheme for his benefit, which she declined; that on

account thereof the defendant became cold and distant, and subsequently cruel, toward the plaintiff; that while they so lived together the defendant was guilty of cruel and inhuman treatment of the plaintiff, practiced by other means than by acts of personal violence toward her, which rendered it unsafe and improper for the plaintiff to longer live with him as his wife; that the defendant is of a sullen, morose, and fretful temperament and disposition, which unfitted him for months at a time during that time from being a companionable husband to the plaintiff; that the allegations of the complaint charging the defendant with cruel and inhuman treatment of the plaintiff were true as alleged; that during the whole of that time ¹⁸⁸ the plaintiff at all times conducted herself in a proper and becoming manner, performing all the obligations of a faithful wife toward the defendant, notwithstanding the unkind and cruel treatment bestowed upon her by the defendant during much of the same time; that the plaintiff's name before her marriage was Pauline A. Cawker; that no alimony was claimed and none was allowed to the plaintiff herein.

As conclusions of law the court found, in effect, that the defendant was guilty of cruel and inhuman treatment of the plaintiff which entitled her to an absolute divorce; that the plaintiff was entitled to a judgment absolutely dissolving the marriage contract between the parties, and freeing them, and each of them, from all the obligations thereof; that the plaintiff during such marriage at all times treated the defendant in a proper and becoming manner as his wife; that the plaintiff retake and resume her maiden name, Pauline A. Cawker.

From the judgment entered thereon accordingly the defendant brings this appeal.

Of course, the plaintiff is not entitled to a divorce unless she has alleged and proved one of the causes for a divorce prescribed by statute: Stats. 1898, sec. 2356. It appears from the record that the plaintiff had consulted attorneys and made a complaint for a divorce on the ground of cruel and inhuman treatment before she had left the defendant; that after the decision of the court upon the first trial, and upon February 6, 1897, the defendant wrote to the plaintiff that he had a position, and was earning fair wages, and expressed a desire to begin over and live together. Sixteen months afterward this action was commenced. The only ground upon which the trial court granted the divorce in this case is that the defendant had been guilty

of "cruel and inhuman" treatment of the plaintiff practiced by "other means" than by acts of "personal violence": Stats. 1898, sec. ~~180~~ 2356, subd. 5. The findings of the court go to the extent of holding that his treatment was such as to render it unsafe and improper for the plaintiff to longer live with the defendant as his wife. This is put wholly on the ground that he was of a sullen, morose, and fretful temperament and disposition. The only intimation in the evidence that such temperament and disposition made it unsafe for the plaintiff to longer live with the defendant is that she had brooded over her troubles until she became very nervous; that she took medicine for such nervousness; that she did not complain of such nervousness nor any sickness on the first trial; that she stated on that trial that her health was good; that her health was still good, "with the exception of nervousness"; that it was not true that her health was a great deal better while she lived with the defendant than it was before; that she was quite ill once or twice while living with the defendant, and had a doctor, who gave her medicine for female trouble which she had, but that such female trouble was not the cause of her nervousness. The doctor who so attended and prescribed for her was sworn and examined as a witness, but gave no evidence as to such nervousness. The defendant testified that he continued to cohabit and have intercourse with the plaintiff up to within a week or two of the time when she left him. The only other evidence of ill-treatment, aside from his temperament and disposition, is that the defendant on two or three occasions, when angry, drew or shoved the plaintiff's little girl, about six years old, by a former husband, across or upon the floor, but that does not seem to have had any particular influence in granting the divorce.

The question recurs whether the evidence referred to is sufficient to sustain the finding that it was unsafe and improper for the plaintiff to live longer with the defendant. It is very true that a sullen, morose, and fretful temperament and disposition may make a man very uncompanionable, ¹⁸⁰ but it does not follow that the exhibition of those qualities in the treatment of his wife is necessarily cruel and inhuman treatment, within the meaning of the statute. The decisions relied upon to support the judgment in this case were made in cases where there was either personal violence in fact, or such conduct on the part of the husband as to render it dangerous or unsafe or im-

proper for the wife to continue to live and cohabit with him: *Johnson v. Johnson*, 4 Wis. 135; *Freeman v. Freeman*, 31 Wis. 235; *Crichton v. Crichton*, 73 Wis. 59, 40 N. W. 638; *Wachholz v. Wachholz*, 75 Wis. 377, 44 N. W. 506; *Hacker v. Hacker*, 90 Wis. 325, 63 N. W. 278; *Reinhard v. Reinhard*, 96 Wis. 555, 65 Am. St. Rep. 66, 71 N. W. 803. This last case goes as far in support of the judgment as any, and the syllabus may be misleading, if considered without reference to the facts upon which it is based. In addition to having a sullen and morose disposition, and living and sleeping in the same house, and eating at the same table food prepared by the wife, without speaking to her, except in anger, for a period of three months, it was shown that the husband had in that case, six years before, struck the plaintiff; that just before the commencement of the action he had raised his hand in a threatening manner, as if to strike her, stating that if she had not then cause for divorce he would give her cause, and then drove her out of the house; that such treatment was notorious, and observed by others, and caused the plaintiff great sorrow, shame, and disgrace, inducing her to attempt to commit suicide; that by reason of such treatment her health had been ruined and she could not longer remain in the same house with him. Such facts brought the case within the rule frequently sanctioned by the English courts, where it is held that "if force, whether physical or moral, is systematically exerted to compel the submission of a wife in such a manner, to such a degree, and during such length of time, as to injure her health, and render a serious malady imminent, it is legal cruelty, and she will be entitled to a judicial separation": *Kelly v. Kelly*, L. R. 2 Pro. & D. 31, on appeal L. R. 2 Pro. & D. 59. And again, "a persistent course of harsh, irritating conduct, unaccompanied by actual violence, but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation, held to constitute legal cruelty": *Mytton v. Mytton*, L. R. 11 P. D. 141. Those cases were followed in a recent case, argued by Sir Charles Russell a short time before being made lord chief justice of the queen's bench, where the facts relied on to establish the charge of cruelty consisted of a long course of systematic neglect and insult, to the effect that the husband refused to allow his wife to occupy the same room with him or to go out with him; that he was frequently absent, and refused to give any account of his absences; that he told her he hated

her presence, frequently using violent language, and threatening to leave her if she did not do as he wished; that "her health rapidly failed during her married life, and, in the opinion of her medical attendants, her husband's conduct, and the mental distress and anxiety caused by her marital relations generally, accounted fully for the serious condition in which they found her," and hence constituted legal cruelty and good ground for a divorce: *Bethune v. Bethune* [1891], L. R. P. D. 205.

The evidence in the case at bar fails to show that the treatment of the plaintiff by the defendant was "cruel and inhuman," within the meaning of those words as used in our statute cited.

By the Court. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to dismiss the complaint.

DIVORCE.—CRUELTY AS A GROUND for divorce is the subject of the monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 60-83. See, also, *Bonney v. Bonney*, 175 Mass. 7, 78 Am. St. Rep. 473, 55 N. E. 461; *Gardner v. Gardner*, 104 Tenn. 410, 78 Am. St. Rep. 924, 58 S. W. 342.

DIVORCE.—COSTS AGAINST A WIFE will not be awarded in a divorce suit brought by her, although she is unsuccessful: *Richardson v. Richardson*, 4 Port. 467, 30 Am. Dec. 538. See, too, *Finley v. Finley*, 9 Dana, 52, 33 Am. Dec. 528.

METZGER v. HOCHREIN.

[107 Wis. 267, 83 N. W. 308.]

NUISANCE—DEFINITION.—Every unlawful use by a person of his own property in such a way as to cause injury to the property rights of another, producing material annoyance, inconvenience, discomfort, or hurt, and every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes an actionable nuisance.

NUISANCE—LAWFUL ACT WITH MALICIOUS MOTIVE. As a general rule, whatever a man may lawfully do on his own property under any circumstances he may do regardless of the motive for his conduct.

NUISANCE—MALICIOUS USE OF PROPERTY—DISAGREEABLE FENCE.—Where no physical injury is done to adjoining property or its occupants, a person may use his own land as he sees fit, regardless of his motives, even if such use render the adjoining property less valuable and desirable for dwelling-house purposes. Hence, one who unreasonably and with malicious motives erects a high and unsightly fence on his own land, which injures the value of adjoining property by diminishing the beauty of its surroundings, shutting off its access to light, and cutting off its view of surrounding territory, does not render himself liable for the maintenance of a nuisance.

Action to restrain an alleged nuisance. Defendant owned a lot adjoining the plaintiff's, on which he erected a fence from eight to sixteen feet high and ninety feet long, out of rough, old, unsightly, and partly decayed lumber, the highest part of the fence being opposite the windows in plaintiff's house. The fence was willfully and maliciously erected, shutting off the view from the plaintiff's house to the street and from the street to the house, greatly injuring the value of the property for rent or sale. A demurrer for failure to state a cause of action was overruled, and defendant appealed.

M. C. Mead, for the appellant.

A. C. Shaw, for the respondent.

MARSHALL, J. The question presented here is, May a person rightly use his own land as he sees fit, regardless of his motives, if that use render adjoining property less valuable and desirable for dwelling-house purposes, merely from diminished beauty of surroundings and access of light to the property, and opportunity to see it from the surrounding territory and to freely view such territory therefrom, there being nothing projected from the adjacent land causing any injury to such property or its occupants? It will be noted that it is not

claimed the acts complained of caused any physical injury to plaintiff's property or to the occupants thereof. The sole complaint is that the beauty and cheerfulness of the property has been injured by defendant's conduct, and that the structure complained of was erected unreasonably and with malicious motives. So the case comes down plainly to the inquiry stated.

It is not an easy task to define with clearness what constitutes a nuisance, so that each case, as it arises, can be accurately tested thereby. Probably the language of Wood on Nuisances, at section 1, often quoted with approval by this court, comes as near strict accuracy as the nature of the subject will permit: Every unlawful use by a person of his own property in such a way as to cause injury to the property rights of another, producing material annoyance, inconvenience, discomfort, or hurt, and every enjoyment by one of ²⁷⁰ his own property which violates the rights of another in an essential degree, constitutes an actionable nuisance. In applying that to any given state of facts, it must be kept in mind that the injury referred to, whether to property or the occupants thereof, is physical. A trade may be carried on in such a way, either by polluting the atmosphere or by creating such disturbances as to cause physical inconvenience to the occupants of adjoining property, as to constitute a nuisance within the rule stated; but acts which do not reach the adjoining property in a physical sense, yet diminish its value and desirability for a particular use, as for dwelling-house purposes, have not been supposed to constitute an actionable nuisance. True, there are decisions in the state of Michigan, and some dicta of courts elsewhere, to the effect that, if one maliciously use his own property to the annoyance of his neighbors, regardless of any physical discomfort to them, he is guilty of an actionable nuisance, the element of malice rendering that an actionable wrong which would otherwise be rightful. That doctrine, however, has very little support. None, in fact, where the rules of the common law have not been changed by legislation and the courts have kept strictly within their legitimate sphere as administrators of the law. The general rule is that whatever a man may lawfully do on his own property under any circumstances he may do regardless of the motive for his conduct: 16 Am. & Eng. Ency. of Law, 930; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Phelps v. Nowlen, 72 N. Y. 40, 28 Am. Rep. 93; Bordeaux v. Greene, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; Rideout v. Knox, 148 Mass. 368,

12 Am. St. Rep. 560, 19 N. E. 390; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570. That doctrine is as well defined in the common law as any that has to do with the rights and remedies cognizable by courts, and courts that have departed from it have, as it seems, trespassed upon the domain of the legislative department of the government.

In *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, the power of the legislature²⁷¹ even was questioned to curtail the use by a person of his own property to the extent of preventing its malicious use, the act under consideration being one to prevent the maintenance of unreasonably high fences from malicious motives. The court said, in effect, that the ownership of land carries with it the constitutional right to enjoy such land in any way the owner sees fit, limited only to such external effects as diminish the physical enjoyment of adjoining property; that such right, regardless of the motive for its exercise, is a property right within constitutional protection, the same as any other property right, and cannot be interfered with except to the extent of reasonable police regulations; that legislation preventing the unreasonable maintenance of a high fence, where a bad motive is the sole purpose thereof, is within the limits of the constitutional exercise of police power. But it was intimated that legislation prohibiting the maintenance of a fence, where a bad motive for such maintenance is coupled with some other that would cause it, independent of the mere desire thereby to annoy an adjoining owner, would contravene constitutional rights of property. The result of the case was that, but for the statutory police regulation of the height of fences, the plaintiff would have been remediless regardless of the height of the fence in question or the motive for erecting and maintaining it.

In the very recent case of *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218, where the fence complained of was forty feet high, the court said that the right of one land owner to erect a structure so as to shut off air and light from the windows of a building on adjoining property is unaffected by the motive; therefore, that whether the fence in question was erected as an improvement or ornament to the property on which it was located, or purely to annoy adjoining land owners, made no difference as to the legal right to maintain it.

With few exceptions, the authorities are all in harmony²⁷² with the foregoing, clearly indicating that the complaint in

question fails to state a cause of action, and that the demurrer was improperly overruled.

This is one of the many cases that may arise where the doctrine of personal liberty and personal dominion of one over his own property enables him to do things to the annoyance of others, not causing actual, material, physical discomfort to them, for which there is no punishment, except loss of that respect which every right thinking man desires from his neighbors and the possession of which is a source of daily enjoyment. If one is so constituted as not to be susceptible to those feelings which a reasonably well-balanced man is supposed to possess, and is so constituted as to obtain more pleasure out of needlessly annoying others than by securing and retaining their respect as a manly member of society, his sovereign right in his own property, to use it as he may so far as that use does not physically extend outside his boundaries to the detriment of others, may be so exercised as to violate the moral obligations which every member of society owes to his neighbors, without any penalty being visited upon him for his misconduct, of which he can be made conscious.

By the Court. The order overruling the demurrer is reversed, and the cause remanded for further proceedings according to law.

A PRIVATE NUISANCE is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another: *Lafin* etc. *Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34, 23 N. E. 389.

A PROPERTY OWNER MAY SHUT OFF AIR AND LIGHT from his neighbor's windows by building a high fence or other structure on his own lots. It makes no difference whether his motive is malice toward his neighbor, or a desire to improve or ornament his own property: *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218. See, further, *Kuzniak v. Kosminski*, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275; *Medford v. Levy*, 31 W. Va. 649, 13 Am. St. Rep. 887, 8 S. E. 302.

BABCOCK v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[107 Wis. 280, 83 N. W. 816.]

RAILROADS—RECOVERY FOR LAND TAKEN—REMOVAL OF TRACKS.—Where the roadbed of a railroad company which has been constructed over the land of another has remained there for a period of five years without objection, the owner meanwhile selling his premises with that burden upon them, the permanent right of occupation is transferred from the owner to the company, and the right of the land owner to obtain compensation for his injury is irrevocable, and cannot be defeated by the company completely removing its roadbed and embankment from the premises.

PLEADING—DESCRIPTION OF PROPERTY—JURISDICTION.—In a suit by a land owner to recover compensation for land taken by a railroad company for the construction of its roadbed, allegations in the petition are liberally construed so far as consistent with reasonable certainty of information, and a petition is sufficient to confer jurisdiction upon the court to ascertain what land within the limits of that described has in fact been occupied by the railroad company, where it alleges that the track was constructed over an ascertainable parcel of land belonging to the land owner, to which is annexed a plat whereon are specified courses and distances, with reference to the duly defined and recorded lot lines.

PLEADING — PETITION—EMINENT DOMAIN—NECESSITY OF TAKING LAND.—In a suit by a land owner to recover compensation for land taken by a railroad company for the use of its tracks, the plaintiff need not allege the necessity of the taking as is required when condemnation proceedings are initiated by the railroad company.

Defendant in 1890 built a spur track on its own land, but in grading the embankment extended over a lot of plaintiff's decedent sixteen feet long by eight feet wide. The track was so close to such lot that in passing around the curve rapidly, cars might swing so that their eaves would overhang the land. In 1895 the land was sold, plaintiff's decedent reserving his claim for damages against the defendant. The decedent commenced suit, alleging ownership of a described lot, and the construction and operation of a spur track over the same "thirty feet wide on each side of its center line, as shown by the map attached to the petition on file." No other description was given. After trial the petition was amended nunc pro tunc by attaching thereto a map showing the location of the track with reference to the decedent's lot lines, the limit of the thirty foot space mentioned in the petition, and also a line marked "Foot of Grade," with figures to indicate the dimensions of the portion of decedent's lot occupied thereby. Defendant denied that it had constructed its track on petitioner's land, denied that it claimed any in-

terest in the land, and before the hearing for the appointment of commissioners, removed its track a few inches, so that the eaves of cars would not overhang the decedent's lot, and removed from the lot all parts of its embankment, so that at the time of the hearing no part of the roadbed was upon the lot. Judgment for plaintiff.

Fish, Carey, Upham & Black, Edward M. Hyzer, and John T. Fish, for the appellant.

Edward S. Bragg and John I. Thompson, for the respondent.

²⁸² DODGE, J. By a long line of decisions, commencing with an intimation in *Buchner v. Chicago etc. Ry. Co.*, 56 Wis. 403, 14 N. W. 273, collected and cited in *Frey v. Duluth etc. Ry. Co.*, 91 Wis. 309, 64 N. W. 1038, and followed in *Hooe v. Chicago etc. Ry. Co.*, 98 Wis. 302, 73 N. W. 787, and *Kuhl v. Chicago etc. Ry. Co.*, 101 Wis. 54, 77 N. W. 155, the force and effect of section 1852 of the Statutes of 1898 has become fully established, to the extent that construction of its track by a railway company over the land of another, when consented to, either expressly or by tacit acquiescence, irrevocably transfers from the owner to the company the permanent right of occupation for operating purposes, leaving to the former owner only the right to obtain compensation in the manner specified in that section. Under this construction, railroad companies have enjoyed immunity from harassment by actions in ejectment or for trespass, and from suits for injunction, and have been relieved from all liability, after ²⁸³ six years from the time of the construction of the track. With such immunity they must accept the liability which the statute imposes, namely, that of compensating the former owner for the injury resulting from the taking away of the rights so vested in the railroad company. The conclusions reached in these authorities are in no wise in conflict with the rule of law urged by appellant's counsel, and sustained by numerous citations, commencing with *Driver v. Western etc. R. R. Co.*, 32 Wis. 569, 14 Am. Rep. 726—that a railway company, having instituted condemnation proceedings, may discontinue them. That rule rests on the right of any litigant originating a suit to terminate it when no interests or rights will be impaired by such termination: *Manitowoc etc. R. R. Co. v. Stolze*, 101 Wis. 93, 76 N. W. 1113; *State v. Ludwig*, 106 Wis. 226, 82 N. W. 158; *Chicago etc. Ry. Co. v. Gates*, 120 Ill. 86, 11 N. E. 855. The rule adopted under section 1852 is predicated upon the completed act of construc-

tion done by the railroad company and acquiesced in by the owner, while the rule of the *Driver* case is predicated upon the incompleteness of the proceeding, so that rights have not already vested.

This court has been prompt to hold the land owner irrevocably bound by silence, sometimes for a very short period. Thus, in *Buchner v. Chicago etc. Ry. Co.*, 56 Wis. 403, 14 N. W. 273, the protest of the land owner came only about a month after the act of the railroad company in constructing its track; but he was held to be already deprived of his rights in the real estate, and of all his rights of action, except that for compensation under the statute.

The only exception or limitation of the rule of the line of cases above referred to is presented in *Morris v. Wisconsin etc. R. R. Co.*, 82 Wis. 541, 52 N. W. 758, where it was held that the circumstances might so entirely refute the purpose to construct the track over the premises of another, and might so fully show that a slight invasion of his premises was by mistake, that, if promptly remedied, the inference of a completed transfer ²⁸⁴ of the right need not arise, but it might be treated as a mere trespass. That principle is not, and need not be, at all questioned in reaching the decision in this case, which presents facts and circumstances so radically different as not to involve it. Here the construction of appellant's track extended some eight feet in one direction and sixteen in another, onto respondent's premises. It had remained there for a period of five years, with no suggestion that even the original construction was done under any mistake; and meanwhile the lot owner had acted, as he had a right to do, on the assumption that the railroad company had constructed its road intending the legal results. He had sold his premises with that burden upon them, and accepted the price which they would bring in that condition. His injury from the construction is irrevocable. It cannot be adequately compensated in trespass, ejectment, or by injunction. Nor is he relieved from that injury by the act of the appellant in now withdrawing its tracks from his premises. That results in benefit to his grantee, but does not enable him to recover from that grantee the reduction in price in all probability accorded by reason of the existence of this burden upon the premises. Surely, maintenance of its track by the railroad company for five years, without protest from the lot owner, brings the present case fully within the rule of *Frey v. Duluth etc. Ry. Co.*, 91 Wis. 309, 64 N. W. 1038, and *Kuhl v. Chicago etc. Ry.*

Co., 101 Wis. 54, 77 N. W. 155; and especially must the situation have become irrevocable where the lot owner has, as in the present case, materially changed his position in reliance upon it. It is not necessary in this case to decide at what moment the transfer of rights becomes irrevocable, so that the real estate rights have passed to the company, and the statutory cause of action in implied or quasi contract is all that remains to the land owner. What we do hold is that the lapse of five years, accompanied by such change of situation as in fairness and equity should work an estoppel, attains that result.

²³⁵ Appellant challenges jurisdiction for certain alleged defects in the petition: 1. In that the description of the land occupied by it is insufficient; and 2. In that the necessity of the taking is not alleged. As to the first objection, we deem the petition sufficient to inform appellant that petitioner claimed that it had constructed its track over an ascertainable parcel of land belonging to him, which included that found by the court to have been so taken and occupied. The plat forms a part of the petition, and thereon are specified courses and distances, with reference to the duly defined and recorded lot lines. Under our statutes (Stats. 1898, secs. 2668, 2669, 2829, 2830), the allegations of the petition are to be treated, not with the technical nicety of an indictment at common law, but with favorable intendment, so far as consistent with reasonable certainty of information to the opposite party and to the court. So treated, this petition is sufficient at least to confer jurisdiction upon the court to ascertain and adjudge what land, within the limits of that described, has in fact been occupied by the appellant's construction.

The second objection has, in effect, already been overruled by this court, in *Chicago etc. Ry. Co. v. Richardson*, 86 Wis. 154, 56 N. W. 741. The proceeding under section 1852, while required to comply generally with that under section 1846, must of necessity differ therefrom, and be relieved from some of the requirements thereof by reason of the different situation—especially so when the petition emanates from the property owner seeking redress for acts already done by the railway company. It would be incongruous to permit the latter to deny necessity of its taking, or to insist on allegation or proof by the other party, when the whole proceeding rests on its own acts, affirming such necessity in the most unambiguous manner.

By the Court. Judgment affirmed.

RAILROADS—EMINENT DOMAIN.—If a land owner acquiesces in the appropriation of his property by a railway company, he cannot assert the legal title thereto against the company: *Charleston etc. Ry. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972. He does not, however, lose his right to recover compensation: *Oliver v. Pittsburgh R. R. Co.*, 131 Pa. St. 408, 17 Am. St. Rep. 814, 19 Atl. 47. Abandonment of its line or track by a railway company, as affecting a property owner's right to compensation for lands taken for the roadbed, is considered in the note to *In Matter of Water Commrs.*, 86 Am. Dec. 202-206; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. 138.

KOHL v. BEACH.

[107 Wis. 409, 83 N. W. 657.]

AGENCY—AUTHORITY TO COLLECT NOTE.—THE POSSESSION of a promissory note by an agent is requisite to constitute apparent authority to collect such note.

AGENCY—EMPLOYMENT OF SUBAGENTS.—While an agent may employ others to assist him in the purely ministerial and unimportant details of his employment, he cannot, as a general rule, employ subagents to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is at the very bottom of the employment.

AGENCY—SUBAGENT—AUTHORITY TO RECEIVE PAYMENT OF NOTE AND MORTGAGE.—Where one employs an agent to loan money for him, such agent to handle the money as his own, and the agent employs a subagent who negotiates a loan secured by a note and mortgage, such note and mortgage being delivered to the lender, the subagent has no authority, upon a default in payment of interest, to collect the entire debt and give an individual receipt therefor, where he has no express or general authority from the lender or his agent to collect such money, and the lender retains the note and mortgage in his possession. Hence, where, under such circumstances, a subagent collects a mortgage debt, neither the mortgagor nor his grantee can maintain an action against the lender to compel satisfaction of such mortgage, in the absence of any facts constituting an estoppel.

Action to require the defendants to satisfy a mortgage. January 4, 1893, one Schafer borrowed of defendant five hundred and fifty dollars, to be repaid in five years at seven per cent interest, and secured by a note and real estate mortgage. The mortgage provided that in case of nonpayment of interest the mortgagee might declare the whole debt due. Defendant resided in New York. The money was loaned in Wisconsin, through defendant's agent Smith, who handled considerable money for defendant and was authorized to loan the money as if it were his own, defendant knowing that Smith must employ others to help him. This particular loan was made through a

subagent, Pulling, at Marshfield, Wisconsin, about one hundred miles from Smith's place of business. Smith and Pulling made a joint agreement in regard to loaning defendant's money, to the effect that both should receive a percentage therefrom, and that Pulling should make collection and remit to Smith; and if collection of interest at maturity could not be made in any case, Pulling should advance the same to Smith, in order that he might advance the same to defendant. Payments of interest and principal upon various loans were made to Pulling from time to time, such payments being generally duly remitted to Smith. Schafer received no notice that Pulling was not authorized to receive payments on the money borrowed by him. On the contrary, Pulling was by letter directed by Smith, in January, 1894, to collect overdue interest of Schafer. Eight dollars and fifty cents of the first installment of interest due on the Schafer loan was in fact paid to Pulling. In April, 1894, Pulling caused foreclosure proceedings to be commenced on the Schafer mortgage for nonpayment of the first installment of interest on the mortgage debt, the defendant being named as plaintiff in the action, and thereafter, on May 17, 1894, Schafer sold the mortgaged premises to plaintiff, at which time the full amount of the mortgage debt, to wit, five hundred and ninety-five dollars and thirty-five cents, was paid to Pulling. When such payment was made Pulling did not have in his possession the note and mortgage, but agreed to procure the same, with a satisfaction of the mortgage, and make delivery thereof to Schafer; but such promise was not kept. Pulling gave to Schafer the receipt of his land company for the money received as aforesaid, which receipt was accepted by Schafer in the belief that Pulling was authorized by the owner of the note and mortgage to receive payment thereof. In the foreclosure proceedings the complaint was verified by Pulling as defendant's agent. Smith had knowledge of Pulling's business transactions in relation to the foreclosure of mortgages, and authorized the same. The trial court concluded as a matter of law that Smith had authority to employ Pulling; that Pulling was, at the time he received the money from Schafer, the agent of defendant by authority of Smith, and that such payment was in effect payment to defendant and extinguished the mortgage in question. Judgment for plaintiff.

Lyman E. Barnes, for the appellant.

George L. Williams, for the respondent.

⁴¹³ **MARSHALL, J.** The decision in this case is not grounded on any estoppel of defendant by his conduct, and the conduct of others for which he was responsible, to deny the authority of Pulling to receive payment of the mortgage debt, and there is no evidence in the record to sustain any such theory. Whatever was the customary way of conducting the business prior to the making of the loan to Schafer, between defendant and Smith and between Smith and Pulling or the Marshfield Land Company, or the way in which business was conducted between the parties thereafter, it is not ⁴¹⁴ claimed, and there is not a word of evidence tending definitely to show, that Schafer knew anything about it or that he was influenced by any appearance of authority on the part of Pulling, other than the circumstance that he borrowed the money through Pulling and the latter had assumed the right to collect interest and to cause an action of foreclosure to be commenced for non-payment thereof.

The customary and indispensable evidence of apparent authority, as was held in *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801—possession of the note—Pulling did not have, as Schafer well knew when he parted with the money. The note and mortgage, and all the papers relating thereto, were in the possession of appellant at New York. Schafer parted with his money upon the mere receipt of Pulling, executed in the name of his land company. The receipt does not purport to be given for appellant, and there was no pretense by Pulling that he was acting by authority, except what was inferable from the fact that he assumed to act in the matter. As was well said in *Joy v. Vance*, 104 Mich. 97, 62 N. W. 140, if Schafer had been as careful to ascertain the authority of Pulling as appellant was to guard his interest by keeping possession of the papers relating to the loan, no one would have suffered by Pulling's dishonesty.

Bartel v. Brown, 104 Wis. 493, 80 N. W. 801, rules this case in this respect: The note not being in Pulling's possession when he received the money, such receipt was not in fact a payment to appellant unless Pulling had actual authority to represent the appellant in the transaction. The question of what is requisite to apparent authority in such cases received careful consideration in the *Bartel* case, and the decision is in line with the great weight of judicial and text-book authority. The principle there declared must be considered as too firmly established to be open to reconsideration. In addition to the authorities

cited in the Bartel case, the following are directly in point: *Engenfritz v. Mutual etc. Ins. Co.*, 81 Fed. 27; *Mutual* ⁴¹⁵ *etc. Ins. Co. v. Miles*, 81 Fed. 32; *Cummings v. Hurd*, 49 Mo. App. 139; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Johnston v. Milwaukee etc. Co.*, 46 Neb. 480, 64 N. W. 1100; *Joy v. Vance*, 104 Mich. 97, 62 N. W. 140; *Trowbridge v. Ross*, 105 Mich. 598, 63 N. W. 534; *Wilson v. Campbell*, 110 Mich. 580, 68 N. W. 278; *Church Assn. v. Walton*, 114 Mich. 677, 72 N. W. 998; *Bacon v. Pomeroy*, 118 Mich. 145, 76 N. W. 324; *Dexter v. Morrow*, 76 Minn. 413, 79 N. W. 394; *Hollinshead v. Stuart*, 8 N. Dak. 35, 77 N. W. 89; *Randolph on Commercial Paper*, sec. 1450, and cases cited.

There is very little conflict in the evidence, and it is not contended, as we understand it, but that the facts were correctly found by the trial court so far as the findings are confined to what was said and done by the parties. From such occurrences and the nature of the business Smith was employed to transact for defendant, the trial court found by inference, as a fact, that Smith was given authority by appellant to employ Pulling to transact the business done by him, including that with Schafer; and further concluded from the facts, as a matter of law, that Pulling was the appellant's agent and that his acts were the acts of appellant. That, as we understand the trial court, is on the theory that the facts found indicate that Pulling was a general agent of defendant and as such was authorized to receive payment from Schafer, such act being within the scope of the general employment. The contest on this appeal is on the points indicated.

We are unable to agree with the trial court's conclusion that the nature of appellant's relations with Smith required the latter to employ assistants and delegate to them authority to perform the important branch of the business of the agency of collecting and remitting money. True, an agent may employ others to assist him in the purely ministerial and unimportant details of his employment, but not to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is at the very bottom ⁴¹⁶ of the employment. The special confidence reposed in the agent as to such matters precludes him from delegating his trust to others, except upon some express understanding with his principal: *Mechern on Agency*, sec. 185, and cases cited.

The doctrine is familiar that if a person be intrusted with a note for collection, and the debtor resides so far from the

place of business of such person that he cannot conveniently reach such debtor so as to properly and promptly perform the service, authority will be implied that such person may forward the note to a collector within convenient reach of the debtor and perform the service through such collector. That is within the general rule that authority to an agent to do an act includes authority to use the usual and necessary means to effect the purposes of the agency.

If Smith had authority in this case to collect the note from Schafer, the fact that he did not have possession of the security effectually, *prima facie*, rebuts the theory that he had authority to transfer his trust to Pulling, because such possession and ability to transfer it to Pulling was indispensable to enable Smith to clothe Pulling with apparent authority to act in the matter and to enforce collection of the debt, if Schafer were to stand upon his rights or even act as a reasonably careful person should.

Having come to the conclusion that the facts found, from which the trial court inferred authority in Smith to employ Pulling, do not lead to such inference, consistent with legal principles, we might decline to go further. However, we have carefully considered the circumstances found by the court, and come to the conclusion, in the light of the law applicable thereto, that they do not warrant the inference that Pulling was authorized by Smith to collect the money from Schafer. We cannot say the relations between Smith and Pulling, and the manner in which they conducted business, were sufficient to prevent Smith from denying Pulling's authority under the doctrine of estoppel, because there ⁴¹⁷ is no finding that Schafer knew of such relation and course of business, neither is there any evidence to that effect, as before indicated. We cannot say that Pulling had implied authority to collect the money from Schafer, because he did not have possession of the note and mortgage. We cannot say that the facts found implied express or actual authority to Pulling to collect the money from Schafer, because such a conclusion, against a person who exercises the precaution to protect himself from fraud or loss by keeping possession of his securities, in favor of another who claims to have extinguished them by payment to such person's agent, within the great weight of, if not universal, authority, requires strong and convincing evidence—much stronger evidence than the circumstances found to exist in this case. A review of a few of the cases already cited will demonstrate the correctness of what is here said.

In *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, cited by appellant's counsel, the mortgagee, a lawyer, having assigned the note and mortgage, by consent of the assignee was allowed to retain possession thereof for the purpose of collecting the interest as it should fall due. Thereafter the mortgagor, in ignorance of the assignment, and without knowing of, hence without relying upon, the mortgagee's custody of the securities, and at a place other than the mortgagee's office where the papers were kept, made payments to the mortgagee to apply on the principal of the debt, which payments the mortgagee embezzled. It was held that, regardless of the hardship to the mortgagor, the stringent rules governing the handling of negotiable paper required the court to hold that the mortgagor, in making the payment to the mortgagee on the mere assumption that he was the owner of the note, because of want of knowledge of the assignment, did not preclude the true owner of the securities from enforcing full payment of the debt.

In *Bromley v. Lathrop*, 105 Mich. 492, 63 N. W. 510, the assignor of a ⁴¹⁸ mortgage, who was engaged in loaning money on real estate and subsequent to the assignment associated others with him in carrying on the same business under the corporate name of the Michigan Mortgage Company, collected the semi-annual installments of interest on the mortgage debt for about nine years, once in the meantime arranging an extension of the time of payment of the principal, and sent such collections, as made, to the assignee upon receipt of the interest coupons. The mortgagor did not know of the assignment of the mortgage, and the assignee did not know that the assignor and his successor assumed to the mortgagor to have any authority other than to receive the interest payments and to remit the same upon receipt of the coupons. At the maturity of the debt, the securities being in the hands of the assignee, the mortgage company demanded payment of the note of the debtor, whereupon he paid the same, supposing from the manner in which the business had been conducted for years that it was the true owner of the debt or had authority to collect it. The court held that there was no ground for a conclusion that the assignee of the mortgage gave to the mortgage company either general or special authority to receive the money for him.

In *Church Assn. v. Walton*, 114 Mich. 677, 72 N. W. 998, the Michigan Mortgage Company was again the mischief maker. A long correspondence between one Bisell and the mortgage company was received in evidence, very much the

same as in this case, showing that Bissell, as agent, made a large number of mortgage loans through the mortgage company, the business covering a considerable period of time, and that the company made all collections of interest on and principal of the loans, and remitted the same to Bissell as such interest and principal became due; that the company received express directions from Bissell, from time to time, or the papers were sent to it for delivery on payment of the money. The mortgage company collected the interest on the loan in ⁴¹⁹ question as occasion required, and in the end collected the principal without any express directions to do so, assuming to have general charge of the Bissell loans, and without having possession of the note and mortgage. The mortgagor made the payment, in ignorance that the mortgage and the debt secured thereby had been assigned, supposing that the mortgage company was the owner thereof. The court held that such facts did not establish a general agency in the mortgage company to collect the principal of the Bissell loans or of the one in question.

The case before us, like those above referred to, and many more that might be cited, is one of great hardship to respondent and his vendor. If there were a way by which they could be protected, consistently with established legal principles, the court would gladly do so. It is plain that one of two parties must suffer from the dishonesty of Pulling. The court cannot determine which one must bear the burden by the standard of which can best bear the loss, but must be guided by the law governing such situations. Appellant used the precaution to keep possession of his securities, the indispensable evidence of implied authority to collect the mortgage debt. No express direction was given to Pulling by anyone to make the collection, and he had no general authority covering the subject. There is certainly no definite evidence that he was in the habit of collecting the principal of appellant's loans without express direction to do so, or possession of the securities. He did not, by anything he said or did at the time the payment was made by Schafer, indicate to him that he was acting under the directions of appellant or Smith. He was responsible to Smith for the payment of interest on the debt, and his closing up of the transactions with Schafer, upon default being made in the first installment of interest, without the option to declare the principal of the debt due being exercised by the owner, indicates that he was acting to save himself rather than ⁴²⁰ to save Smith or appellant, or to perform an authorized service for

them or either of them. His position enabled him to impose on Schafer by obtaining the latter's money without a surrender of the note and mortgage, simply because Schafer neglected to insist on such surrender before making the payment. The penalty of such negligence must rest upon the one who was at fault. The misfortune cannot be shifted to appellant, who rightfully relied on the possession of his securities for collection.

By the Court. The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment dismissing the complaint, with costs.

SUBAGENT, APPOINTMENT AND POWER OF.—While an agent cannot delegate any portion of his power requiring the exercise of discretion or judgment, he may do so as to powers or duties merely ministerial: See the monographic note to *Davis v. King*, 50 Am. St. Rep. 112; *McCroskey v. Hamilton*, 108 Ga. 640, 73 Am. St. Rep. 70, 34 S. E. 111. The authority of collection agencies to appoint subagents, and the powers of such subagents, are considered in the note to *Davis v. King*, 50 Am. St. Rep. 116, 117.

COLLECTING AGENT—POSSESSION OF THE SECURITY.—Payment of money due on written security, to an agent who has not possession of the security or express authority to receive such money is not good, and the principal may compel the debtor to pay it again: *Smith v. Kidd*, 68 N. Y. 180, 23 Am. Rep. 157.

FRENCH LUMBERING COMPANY v. THERIAULT.

[107 Wis. 627, 83 N. W. 927.]

FRAUDULENT CONVEYANCES—VOID MEANS VOIDABLE.—UNDER A STATUTE providing that every conveyance of any estate or interest in lands made with the intent to hinder, delay, or defraud creditors shall be void, the term "void" means voidable, because the conveyance vests title in the vendee subject to the right of defrauded creditors to avoid it.

JUDGMENT LIENS—LAND FRAUDULENTLY CONVEYED.—A judgment against a fraudulent vendor of real property, entered subsequently to the fraudulent transfer, and which has been duly docketed in the county where such real estate is located, does not of itself create a lien on such property, because the conveyance vests in the fraudulent vendee the title of his vendor subject to the right of the defrauded creditors at their election to avoid it.

JUDGMENT LIENS—LANDS FRAUDULENTLY CONVEYED BEFORE JUDGMENT—HOW TO PERFECT LIEN.—A judgment, standing alone, which was rendered after the debtor had fraudulently conveyed his real property constitutes a mere right to acquire a lien upon such property, which requires the issuance of a writ of execution or of attachment and an actual seizure of the prop-

erty thereunder, in order to ripen into such an interest in the property as will be recognized by a court of equity in an action to remove a cloud thereon by the owner of such interest.

JUDGMENT LIENS—FRAUDULENT TRANSFER—CREDITOR'S RIGHTS IN EQUITY.—A judgment creditor, as against whom real property has been fraudulently conveyed prior to the entry of his judgment, can avoid such transfer and obtain a specific lien upon the property only by a seizure thereof under a writ of attachment or execution, or, after the exhaustion of all legal remedies to collect the debt without success, by an appeal to a court of equity to remove the impediment to the judgment attaching to the property.

JUDGMENT LIENS—FRAUDULENT TRANSFER—DEATH OF DEBTOR—CREDITOR ACQUIRING LIEN.—If a fraudulent vendor of real property dies before his judgment creditor obtains a specific lien on such property, the judgment creditor cannot, by execution against the property, secure a lien thereon which equity will protect.

DEEDS OF INSANE PERSONS—VOIDABLE.—The deed of an insane person who has not been adjudged insane and placed under guardianship is merely voidable, such deed passing the title to the land to the grantee, subject to be divested according to law.

DEEDS OF INSANE PERSONS—JUDGMENT LIEN—DEATH OF INSANE GRANTOR.—A judgment against an insane debtor rendered after he has made a transfer of his real property will not be a specific lien on such property until after the conveyance is avoided; and if the debtor dies before the conveyance is avoided, the judgment creditor cannot by execution levy obtain a lien on such property which equity will protect.

February 23, 1898, plaintiff recovered a judgment against Isador Lavoie for two thousand eight hundred and twenty-four dollars and sixty cents, and on the next day it was docketed in Chippewa county. Execution was issued September 8, 1899, before this action was commenced, and certain property was seized. January 24, 1898, Lavoie was adjudged insane, having been insane for some time. On the same day the defendant, with knowledge of his insanity, fraudulently induced Lavoie to execute a deed conveying to him the lands in controversy, with intent on defendant's part to hinder and delay Lavoie's creditors, especially the plaintiff. Defendant gave no consideration for the lands. Lavoie became indebted to the plaintiff on a promise made before he became insane. Lavoie died March 5, 1898, without sufficient property to pay his debts. Prayer that the conveyance to defendant be declared void, that defendant be enjoined from selling or encumbering the lands, and that a lien be adjudged thereon in plaintiff's favor. Demurrer to the complaint was overruled, and defendants appealed.

W. M. Bowe and J. A. Anderson, for the appellants.

W. H. Stafford and W. F. Bailey, for the respondent.

630 MARSHALL, J. Section 2902 of the Statutes of 1898 is to the effect that a money judgment, when docketed as provided by law, shall, for a period expiring ten years from the date of the rendition thereof, be a lien on the real property of the judgment debtor, except his homestead, in the county where the same is docketed. If the real estate which respondent seeks to reach in this action was the property of Lavoie, within the meaning of that section, when the judgment against him was docketed it obviously became a lien thereon. Section 2978 provides that after the expiration of one year from the 630 death of a judgment debtor, execution may be issued by permission of the court or the judge thereof upon good cause shown, against any property upon which such judgment shall have been a lien at the time of the death of such debtor, and may be executed in the same manner and with the same effect as if he were living. According to the complaint plaintiff was a judgment creditor of Lavoie when he died. All the facts exist and are properly alleged in the complaint requisite to the maintenance of the action to remove the apparent impediment to respondent's judgment lien, created by the deed of Lavoie to Theriault made prior to the rendition of the judgment, if, notwithstanding such deed, such judgment was in fact, at the time of the death of the grantor a specific lien upon the land. It is conceded that, if the lien did not exist by virtue of the judgment alone, none was acquired by the execution issued thereon after Lavoie's death, because in that event the execution was wholly unauthorized by law and void.

From what has preceded this is the first question to be solved in reviewing the decision of the circuit court overruling the demurrer to the complaint: Is a judgment, properly docketed in the county where real estate is located which the judgment debtor previously owned but before such docketing conveyed to another, a lien on such real estate if such conveyance is void under section 2320 of the Statutes of 1898? That section provides that: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands . . . made with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands . . . shall be void." The learned counsel for respondent contend that the word "void" in the section means absolutely void; that as regards a person circumstanced as plaintiff was when Lavoie made his deed to Theriault, the title to the property attempted to be conveyed remains entirely unaffected by 631

such attempt; and that the judgment attaches to and becomes a lien thereon accordingly. That such is the law in many and perhaps most jurisdictions, and is so laid down by many and perhaps most, if not all, of the elementary writers, as contended by the learned counsel for respondent, possibly cannot be successfully denied. But that the law is to the contrary, as declared by this court as early at least as *Hyde v. Chapman*, 33 Wis. 391, decided in 1873, certainly cannot be gainsaid. The doctrine of that case was fully considered and approved by this court in *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, decided in 1892. True, the decision there was made by a divided court, but that hardly takes much from its force as regards what the law is for this state, since it has existed for over a quarter of a century and necessarily has become by that lapse of time a rule of property. We are not unconscious at all of the force of the attack now made upon the doctrine of this court. It is but a renewal of the attack made in *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, where, notwithstanding strong judicial opposition, as indicated by the able and exhaustive dissenting opinion written by Mr. Justice Pinney, concurred in by Mr. Justice Winslow, the early view of the law declared in *Hyde v. Chapman*, 33 Wis. 391, was adhered to. It is needless to speculate now upon how the court would then have decided or as present constituted would decide if the question were presented as an original proposition. It will be readily admitted that the law of the state, as declared by its highest court, upon a careful consideration of the subject involved, should not be changed without some very strong reason therefor. A mere change in the personnel of the bench, and of individual opinions of judges, is not sufficient; and when the law as so declared has remained undisturbed for a long period of time, for example, twenty-five years or more, and necessarily become a rule of property, it should not be changed at all by mere judicial declaration. Under such circumstances courts ^{must} must follow the maxim, "*Stare decisis, et non quieta movere.*" (To adhere to decisions, and not disturb questions that have been established.)

The foregoing renders unnecessary any attempt even to review the able argument of counsel for respondent, by which the idea was vigorously pressed upon our attention and consideration that the word "void" in section 2320 means absolutely void as to creditors, and that a judgment against the fraudulent vendor

attaches to the property fraudulently conveyed regardless of the conveyance. It is sufficient to say that the contrary is the law of this state and that it is so firmly entrenched in our jurisprudence as not to be open to question. However, it is deemed best not to dismiss the subject without correcting the error counsel seems to have fallen into, that *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, and *Hyde v. Chapman*, 33 Wis. 391, are out of harmony with other cases decided by this court. In endeavoring to make such correction we shall not attempt to defend the reasoning of prior decisions, but merely state the facts and conclusions of each case, treating the results as not now open to question.

In *Eastman v. Schettler*, 13 Wis. 325, upon which great reliance is placed to support the attack on *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, it will be noted that, while the court said *arguendo* that "if the conveyance of the land was made with intent to defraud the judgment creditor it was void and the judgment became a lien upon it," the court was not speaking of the effect of the judgment by itself, but its effect under the circumstances of that case, which were that it had been enforced by a seizure of the realty in question (so far as such a seizure can take place under an execution), a sale thereof under the execution, and the perfection of the sale by the making and delivering of a deed to the purchaser. Under those circumstances, it was said that the purchaser could maintain an action to recover the land, because the deed ⁶³³ conveyed to him the title thereto regardless of the fraudulent conveyance of the property prior to the rendition of the judgment.

In the *Gilbert* case the rule of the *Eastman* case was limited to its facts upon the theory that the proceedings under the execution created a lien upon the property, but that none existed before the levy under the execution, which is in harmony with the cases that uphold the right to proceed in equity in aid of an execution levy upon land which has been conveyed by the judgment debtor in fraud of his creditors but deny the right in the absence of such levy, because, while the judgment of itself is not a lien upon the property, a lien thereon may be acquired by seizure thereof under the execution issued on the judgment.

In *Cornell v. Radway*, 22 Wis. 260, the sheriff had levied upon the property and advertised it for sale under an execution issued on the judgment. The court said the case belonged to that class where one is compelled to resort to a court of equity

for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on execution, and not to the class where a person resorts to equity as a general creditor to obtain satisfaction of his debt; that while in the latter class of cases all legal remedies must be exhausted as a condition precedent to the maintenance of the action, in the former the party has a right, under the established rules of equity jurisprudence, to invoke equity to remove a cloud upon an existing interest in real property. True, the court based its decision on *Gates v. Boomer*, 17 Wis. 455, remarking that such case was "an action by the judgment creditors of one of the defendants to have a deed excuted by him to his codefendant set aside as a fraudulent obstruction to the proceedings of the plaintiffs to enforce the lien of their judgment so that they might sell the property upon execution," and said, *arguendo* and partly outside the facts of the case, that, "The judgment of ^{the} plaintiff is by statute a specific lien upon the land without the issue or levy of an execution. . . . The existence of the lien without adequate remedy for enforcing it at law, by reason of the fraudulent or inequitable obstruction interposed by the defendant, is sufficient to give a court equity jurisdiction," indicating that, to the writer of the opinion at least, the mere fact of proceedings having been had to enforce the judgment was without significance as regards whether the plaintiff was possessed of an interest in the property covered by the fraudulent conveyance which equity would free from an existing cloud upon it. But the fact remains that these circumstances were present: An execution on the judgment and proceedings thereon against the property by a levy under the execution by advertising the property for sale as provided by law; which circumstances, later in the history of similar litigation, came to have controlling significance, and without conflict with anything actually decided in the *Cornell* case when tested by its facts.

It will be found that there is nothing in *Gates v. Boomer*, 17 Wis. 455, to call for or justify the remark made in *Cornell v. Radway*, 22 Wis. 260, so far as such remark was outside the facts of the case. In the former case the facts were that while there was no execution levy, an execution had been issued and returned unsatisfied, and all the legal remedies of the judgment creditor to collect his debt had been exhausted without his being able to obtain any satisfaction thereof. In that situation the court held that the creditor, as to property fraudulently transferred by the judgment debtor, and upon which the creditor would,

but for such transfer, have had an unclouded specific lien, was entitled to invoke the aid of equity to enforce his right to a lien by removing the fraudulent obstruction thereto. "The case," said the court, "belongs to the class where the issue of the execution gives the plaintiff a specific lien upon the property, but he is compelled to go to a court of equity for the purpose of removing some obstruction ⁶³⁵ fraudulently or inequitably interposed to prevent a sale on execution."

In *Galloway v. Hamilton*, 68 Wis. 651, 32 N. W. 636, the maintenance of an action in equity by a judgment creditor circumstanced somewhat different than respondent is, turned on the fact that a lien had been obtained by a levy upon the property under an execution, the prior cases in this court being referred to as in harmony with the decision. The court said: "If it be true that the real estate seized on the execution belonged to the judgment debtor, and a deed has been put upon record which purports to convey the legal title to another, which will have the effect to defeat or greatly impair the lien unless the deed is canceled, we suppose it is well settled that a court of equity will interfere and remove the inequitable obstruction. "The equitable relief sought rests upon the fact that the execution has issued, and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation." After thus disposing of the point under consideration it is probably unfortunate that the court said *arguendo*, and as will be plainly seen, somewhat outside the case, quoting the obiter remark in *Cornell v. Radway*, 22 Wis. 260, heretofore referred to. "Where the judgment of the plaintiff is by statute a specific lien upon the land without the issue or levy of an execution, it would seem that the plaintiff is entitled to the aid of the court, whether execution has been issued and returned unsatisfied or not," thus in a measure keeping up the uncertainty as to whether a judgment, standing alone, is a specific lien upon the real property of the judgment debtor which he fraudulently conveyed prior to its rendition, instead of its being a mere right to acquire a lien, which requires the issuance of an execution and an actual seizure of the property thereunder in order to ripen into such an interest in the res as will be recognized by a court of equity in an action to ⁶³⁶ remove a cloud thereon by the owner of such interest. It should be said that the remark referred to was good law as applied to the case, because the attempted conveyance of the property was absolutely void for

want of authority to make it, though the decision was not very clearly placed on that ground.

In *Evans v. Laughton*, 69 Wis. 138, 33 N. W. 573, the property was seized under a writ of attachment. This proposition, among other things, was sufficiently involved to receive the attention of the court: Was the conveyance made to hinder and defraud creditors? the idea being that if such was its character no lien was acquired thereon by the attachment. On such proposition the court said, in effect, that, if it were to be decided in the affirmative the judgment creditor would be at liberty, notwithstanding the conveyance, to seize the land on execution or attachment as the property of his debtor, and thereby acquire a specific lien at law which equity would lend its aid to protect.

In *Ahlhauser v. Doud*, 74 Wis. 400, 43 N. W. 169, an action in equity, by a judgment creditor to remove a cloud from his lien upon property fraudulently mortgaged and conveyed by the judgment debtor, was sustained solely upon the ground that the plaintiff had in fact acquired a specific lien on such property by a seizure thereof under an execution issued on his judgment. True, it was there said that: "The fraudulent deeds and mortgages are absolutely void, and conveyed no estate to the grantees and mortgagees as against the claim of the plaintiff, and so the lien of the judgment and execution is perfect"; but it will be observed that the lien was spoken of as being created, not by the judgment, but as being single and created by the judgment and execution; and by a careful reading of the opinion it will be clearly seen that it proceeded to a conclusion on the theory that the fraudulent instruments were absolutely void only in the sense that they were void at the election of the judgment creditor ⁶³⁷—that is, that they were voidable; that the term "absolutely void" was not appropriately used; that the title to the property was so affected by the fraudulent conveyances that without an actual seizure of it under an execution or attachment the creditor could not obtain a specific lien thereon but only the right to a lien; that upon such right being exercised by the specific act of election, to avoid the fraudulent transfers, of a seizure of the property, an actual interest therein was acquired, leaving such conveyances as mere clouds upon such interest which equity would lend its aid to remove.

We have now reviewed the more important cases preceding *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, and shown, it would seem, as regards anything actually decided therein, that they are all in harmony

with the decision in that case and with what is here decided—that is, that a judgment against a fraudulent vendor of real property, which has been duly docketed in the county where such real estate is located, does not of itself create a lien on such property, because the conveyance vests in the fraudulent vendee the title of his vendor subject to the right of the defrauded creditors at their election to avoid it; that such creditor can only avoid the fraudulent transfer and obtain a specific lien upon the property covered by it by a seizure thereof under a writ of attachment or execution, or, after the exhaustion of all legal remedies to collect the debt without success, by an appeal to a court of equity to remove the impediment to the judgment attaching to the property; that in the absence of such seizure the judgment creditor has only the right to a lien upon the property fraudulently conveyed and to enforce such lien for the satisfaction of his debt, which right, being strictly legal, cannot be protected in equity till the creditor has first exhausted all his legal remedies to that end, as indicated; that when the right to a lien upon the property fraudulently conveyed ripens into a lien in fact by an actual ^{and} seizure of the property under attachment or execution, a court of equity will then lend its aid to free the lien from the cloud upon it created by the fraudulent conveyance.

Having disposed, adversely to the respondent, of the contention that its judgment and the docketing thereof in the county where the land in controversy lay created a specific lien upon the property, assuming that the prior conveyance thereof was void as to the creditors of the grantor because tainted with fraud, under section 2320 of the Statutes of 1898, it is not necessary to decide the question, argued in the briefs of counsel, of whether the facts alleged in the complaint are sufficient to show that the deed was so tainted.

The only question left for consideration is this: Is the deed of an insane person, who has not been adjudged insane and placed under guardianship, merely voidable? If it is absolutely void, then, according to the complaint, the title to the property in question did not pass to Theriault by the conveyance under which he claims. In that event the respondent's judgment became a lien upon the property and the complaint shows a good cause of action in equity to remove the cloud upon such lien.

There is some conflict of authority in this country, and between the courts of this country and those of England, regarding the character of an insane person's deed. In England it

is held that such a deed is absolutely void: *Ball v. Mannin*, 1 Dow & C. 380. There are a few authorities to the same effect in this country, most or all of which, upon careful examination, will be found to be quite undecisive and unsatisfactory. The text-writers are in substantial accord that an insane person's deed conveys title to the grantee and is voidable only: *Devlin on Deeds*, sec. 73; 1 *Washburn on Real Property*, 5th ed., 486; 2 *Kent's Commentaries*, 452; *Kerr on Real Property*, sec. 2316; *Pingree on Real Property*, sec. 1281; 1 *Jones on Real Property*, sec. 52; 1 *Story's Equity Jurisprudence*, secs. 222, 228; 11 *Am. & Eng. Ency. of Law*, 1st ed., 133. The only text-writer that is out of line ⁶³⁹ is *Beach*. He states the law in accordance with the English doctrine in his late work on the *Modern Law of Contracts*, at section 1390, in a few words, without comment even to the extent of recognizing a conflict of authority on the subject. The only support for the text in the notes is a few New York cases, none of which support it in fact, the leading case being *Van Deusen v. Sweet*, 51 N. Y. 378, to which further reference will be hereafter made. The most prominent case cited is one decided in the supreme court of New York, *Brown v. Miles*, 16 N. Y. Supp. 251, reported in the regular series of state reports in 61 *Hun*, 453. That is cited as a definite judicial declaration that the great weight of authority is to the effect that an insane man's deed is absolutely void. The writer of the opinion so says, citing, however, only a few New York cases, none of which in fact support the doctrine to its full extent.

It is deemed proper to call special attention here to the careless manner in which the text above referred to was prepared, lest the profession be misled by it. It illustrates the danger of placing any great reliance on some of the modern text-books, and the importance of more care being exercised in their preparation.

In *Devlin on Deeds*, section 73, the law is stated thus: "The deed of a person non compos mentis who is not under guardianship transfers a seisin and is merely voidable." That is supported by a large collection of cases from many states of the Union. In *Washburn on Real Property*, fifth edition, page 486, it is said that infants and insane persons not under guardianship are in the same class, substantially, in respect to their acts being voidable and not void. Both of the text-writers specially referred to cite *Van Deusen v. Sweet*, 51 N. Y. 378, and *Farley v. Parker*, 6 Or. 105, 25 *Am. Rep.* 504, which is based on the

New York case, as exceptions to the great array of authority to which they call attention.

In *Van Deusen v. Sweet*, 51 N. Y. 378, the court did not go to the extent ⁶⁴⁰ of holding that the deed of an insane person, though not under guardianship, is in all cases absolutely void. The decision was limited to cases where the insanity is of such a nature as to render the subject of it absolutely incompetent to act mentally in the transaction—to persons so insane as to be wholly devoid of reason. It was said, in effect, that there is no doubt that a person may be insane and his mental unsoundness be of such a nature as to render his acts only voidable; that the mere fact of the insanity of the maker of a deed, regardless of the degree of insanity, is not sufficient to render the deed absolutely void if he is not, at the time of making it, under guardianship because of his infirmity.

There is strong reason for the idea that, if a person is so utterly devoid of mental power as to be totally incapable of comprehending the nature of his act in making a deed, or knowing that he is engaged in such a transaction, the instrument should be held to have no legal existence for any purpose. That is as far as the New York court has gone.

If we were to hold in accordance with *Van Deusen v. Sweet*, 51 N. Y. 378, it would not save the complaint from condemnation as not stating a cause of action, for there is no allegation in it in regard to Lavoie's condition at the time he made the deed, except that he was insane. The degree of his insanity is not alleged. In *Aldrich v. Bailey*, 132 N. Y. 85, 30 N. E. 264, a complaint, held by the lower court on the strength of *Van Deusen v. Sweet*, 51 N. Y. 378, to state a good cause of action to avoid certain deeds as absolutely void, was condemned, without affirming the rule laid down in the *Van Deusen* case, for want of allegations showing that the grantor of the deed was wholly without mental capacity. Though some twenty years had elapsed since the decision in that case, the court declined to say it was correctly decided, but said that, assuming its correctness, a complaint to annul the deed of an insane person not under guardianship is insufficient, unless it shows that such person was absolutely and completely unable to understand ⁶⁴¹ or comprehend the nature of the transaction. Other New York cases are in the same line: *Riggs v. American Tract Soc.*, 95 N. Y. 503; *Valentine v. Lunt*, 115 N. Y. 496, 22 N. E. 209.

Valpey v. Rea, 130 Mass. 384, is cited to our attention as holding that the deed of an insane person is absolutely void unless

ratified by the grantor on recovering his reason. *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735, should be added. However, they do not go to the length contended for. In the one case it is said that the deed of an insane person is ineffectual to convey the title to land "against the grantor or against his heirs and devisees, unless it is confirmed by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees." That language was repeated in the second case in connection with the following: "Such deed may be disaffirmed, without returning the consideration money or placing the other party in statu quo." A careful analysis of the quoted language must lead to the conclusion that the Massachusetts court came far short of holding what respondent contends. A thing that "may be made good by ratification," or is not so binding but that it may be "disaffirmed," it would seem, must be said to be voidable only. That such was the sense in which those terms were used appears conclusively by the fact that numerous early Massachusetts cases were referred to as having established the doctrine declared, in all of which it was distinctly held that the deed or contractual act of an insane person is merely voidable. For example, in *Carrier v. Sears*, 4 Allen, 336, 81 Am. Dec. 707, it was said: "The contract of an insane person, or one obtained by fraud or duress, is voidable and not void." In *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414, after some other not very well considered remarks, it was said, *arguendo*, speaking of the insane person as the demandant: "The estate is still in the demandant; for if it passed, it passed by the deed of an insane man never ratified or confirmed. That, in law, is impossible." The court however, ⁶⁴² referred to *Allis v. Billings*, 6 Met. 415, 39 Am. Dec. 744, saying that it settled the law for Massachusetts that the deed of an insane person is voidable only. In the *Allis* case the lower court instructed the jury that the deed was absolutely void. That was held error on the appeal, the court remarking: "The jury should have been instructed that this fact [of insanity], if established, rendered the deed voidable." Numerous other Massachusetts cases to the same effect might be cited.

If any further support were needed for the view that the late Massachusetts cases do not change the rule early laid down and affirmed in that court, it is furnished by *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705, where language is used similar to that in *Valpey v. Rea*, 130 Mass. 384, as regards ratification

or confirmation being necessary to render an insane man's deed valid. What was meant by such language is clearly shown by the language of the decision as follows: "The deed of an insane man not under guardianship is not void, but voidable," etc. "If under guardianship, the deed is absolutely void." A multitude of cases to the same effect might be cited. We will refer to only a few of them: *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Nichol v. Thomas*, 53 Ind. 42; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Elston v. Jasper*, 45 Tex. 409; *Odom v. Riddick*, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. 609; *Burnham v. Kidwell*, 113 Ill. 425; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 648.

Our attention is called to *Dexter v. Hall*, 15 Wall. 9, as holding to the contrary of the cases above cited. If counsel were right as to that case, we should hesitate before running counter to it on a new question in this court, unless there is such an overwhelming weight of authority against it as to clearly show that it is wrong. What is in fact decided in *Dexter v. Hall*, 15 Wall. 9, is that a power of attorney made by an insane person is absolutely void. Reference is made to the doctrine of the English courts, that the deed of an insane ⁶⁴⁸ person is classed with such person's power of attorney, but the court recognized that there may well be a distinction between an insane person's power of attorney and his deed. It was said, as regards the character of the former, that the decisions in England and in this country are in harmony, but that as regards the character of the latter, whether voidable or absolutely void, there is considerable conflict and inconsistency. The decision of the court, however, was confined, as it necessarily had to be, to the question before it, and we are unable to find that the doctrine announced has ever been extended in that court to deeds. In *Johnson v. Harmon*, 94 U. S. 371, the subject was referred to, it being said that the deed of a person so bereft of reason as not to be able to distinguish between right and wrong is at least voidable.

There are cases where courts have reached the same conclusion as to the scope of *Dexter v. Hall*, 15 Wall. 9, as that urged by respondent's counsel. For example, in *German Sav. etc. Soc. v. De Lashmutt*, 67 Fed. 399, decided in the circuit court

for the district of Oregon, the following language is used: "Whatever difference of opinion once existed as to whether the deed of an insane person was void or voidable, the question is authoritatively settled that such deed is absolutely void": Citing *Dexter v. Hall*, 15 Wall. 9; *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504. The latter case, it will be remembered, merely followed *Van Deusen v. Sweet*, 51 N. Y. 378, to the effect that the deed of a person so insane as to be wholly bereft of reason is absolutely void, and *Dexter v. Hall*, 15 Wall. 9, does not attempt to decide the question at all. In *Parker v. Marco*, 76 Fed. 510, decided in the United States circuit court for the district of South Carolina, Mr. Justice Simonton, who delivered the opinion, said that in *Dexter v. Hall*, 15 Wall. 9, "the question before the court was whether the deed of an insane person was void or voidable. To that question the court directed its attention and solved the doubts created by conflicting ⁶⁴⁴ decisions in other jurisdictions, fixing the law in the federal courts, which was afterward amplified by Mr. Justice Clifford in *Johnson v. Harmon*, 94 U. S. 371." How very far that statement is from what was in fact decided in those cases is clearly indicated by what has been said. No attempt was made to harmonize conflicting decisions in this country. As indicated, the law as settled in England was referred to, also the inconsistencies in the adjudications of this country as to deeds of insane persons, without expressing any decided opinion as to the right of the matter, and then the question presented for adjudication was decided in harmony with the decisions of the English courts and those of this country as well.

We have now carried the discussion of the subjects presented by this appeal to a considerable length, though no greater, probably, than their importance warrants. We received much assistance from the able briefs of counsel on both sides of the controversy, and have pursued our investigations to a satisfactory conclusion. On the first branch of the case we have shown, as it seems, that there is a substantial harmony in the decisions of this court, from the beginning, on the lines laid down in *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, which are tied to the idea expressed in that case that the word "void" in section 2320 of the Statutes of 1898 means voidable, and that the title to lands conveyed in fraud of creditors actually passes to the vendee, subject, however, to be divested at the election of any such creditor. On the second branch of the case we have shown that

there is substantial harmony in the decisions of this country contrary to the law as held by the English courts, that the deed of an insane person is voidable, not void; that the exceptions to that doctrine are few in number and are either based on a misconception of the authorities on which they are grounded, or follow the lead of *Van Deusen v. Sweet*, 51 N. Y. 378, which goes no further, as we have shown, than to hold that ⁶⁴⁵ the deed of a person absolutely bereft of reason is absolutely void. We must hold that at the time respondent's judgment was rendered, the judgment debtor did not have title to the land in controversy, hence that such judgment did not become a specific lien thereon, whether the deed to Theriault be considered as tainted with fraud under section 2320 of the Statutes of 1898, or to be the deed of an insane person. In any event, the deed passed the title to the land to the grantee therein named, subject, however, to be divested according to law. Plaintiff not being possessed of a lien upon the land by virtue of his judgment, his right to enforce the judgment by execution did not survive the death of Lavoie, so no lien was acquired under the execution levy. The demurrer to the complaint, therefore, should have been sustained.

By the Court. The order appealed from is reversed, and the cause remanded for further proceedings according to law.

Cassoday, C. J., took no part.

A FRAUDULENT CONVEYANCE IS NOT VOID *per se*, but only voidable: *Doster v. Manistee Nat. Bank*, 67 Ark. 323, 77 Am. St. Rep. 116, 55 S. W. 137. As between the parties, it is valid: *Bradtfield v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, 40 Pac. 1; *Preston-Parton Milling Co. v. Dexter Horton & Co.*, 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412.

FRAUDULENT CONVEYANCE—JUDGMENT LIEN.—As between the parties thereto, a fraudulent conveyance is absolute and good against the grantor, and no interest, legal or equitable, remains in him, upon which the lien of a judgment subsequently acquired can attach: *Preston-Parton Milling Co. v. Dexter Horton & Co.*, 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412.

THE DEED OF AN INSANE PERSON IS VOIDABLE only, and not void, if executed before an inquisition and finding of lunacy: See the monographic note to *Flach v. Gottschalk*, 71 Am. St. Rep. 431. Consult, also, *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97.

HOLDRIDGE v. MENDENHALL.

[108 Wis. 1, 83 N. W. 1109.]

STREET RAILWAYS—INJURY TO CHILD IN STREET.—Though a boy a little less than seven years of age is upon a public street in the daytime, unaccompanied by his parents or any custodian, and is run over by a street-car and injured, it is for the jury to determine, in an action by his father for loss of services, whether the boy was guilty of contributory negligence, and whether his parents were guilty of negligence in thus permitting him to be alone upon the street.

STREET RAILWAYS—INJURY TO CHILD IN STREET—EXCESSIVE SPEED OF CAR.—If a motorman on a street-car has no reason to anticipate that a boy, less than seven years of age, will suddenly and unexpectedly dart in front of the car, while in motion and only a few feet distant, and when it cannot be stopped, or an effective warning given, whatever may be the speed of the car, he cannot be called negligent, and if the child, in so doing, is run over and injured, it cannot be said that the proximate cause of the injury was the car's excessive speed.

EVIDENCE OF PECUNIARY CONDITION OF PLAINTIFF. In an action by a father to recover for the loss of services of his minor son, evidence of the plaintiff's pecuniary condition, the amount of his property, his earnings, and the size of his family, is inadmissible.

Action by a father to recover for the loss of services of his minor son, who, while a little less than seven years of age, was run over by a street-car, operated by the defendant as receiver for a railroad company.

Ross, Dwyer & Hile and W. D. Dwyer, for the appellant.

Heber McHugh and W. P. Crawford, for the respondent.

⁴ **WINSLOW, J.** The boy who was run over by the defendant's street-car in this case was a little less than seven years of age, and was upon the public street, in the daytime, alone, or at least not accompanied by either his parents or any custodian. It is argued that the trial court should have taken the case from the jury and granted a nonsuit on the ground of contributory negligence on the part of the boy or his parents. This contention cannot be sustained. In case of an accident happening to a child of such tender years, it must be an extreme case indeed which would warrant a court in granting a nonsuit on the ground of the child's negligence; and it is frequently said that such a child cannot be held guilty of contributory negligence as a matter of law: *Johnson v. Chicago etc. Ry. Co.*, 49 Wis. 529, 5 N. W. 886; *McVoy v. Oakes*, 91 Wis. 214, 64 N. W. 748.

Nor can it be said that the parents are guilty of negligence as matter of law for permitting such a child to be alone upon the street. Both of these questions were properly for the jury upon the evidence: *Johnson v. Chicago etc. Ry. Co.*, 49 Wis. 529, 5 N. W. 886.

But the question whether the evidence showed any negligence on the part of the motorman which was the proximate cause of the injury is a more difficult one. The negligence claimed is that the car was running at excessive speed, that no signals were given, and thus that the boy was run down, when the evidence tended to show that he had been on the track a sufficient time within which signals could have been given or the car stopped before reaching him. There is no dispute but that the accident happened in the middle of a block, at a place where people were not expected to cross the street; and it is admitted that the street-car, at the time of the accident, had only proceeded about one hundred and fifty feet from a full stop. One of the plaintiff's witnesses testifies that in his judgment the car was going at the rate of twenty-five miles an hour when it was still about sixty feet from the boy, or at a point about ninety feet from the starting point. ⁵ There is no other testimony, however, which corroborates this estimate, and the testimony of the remaining witnesses on the subject is that the speed did not exceed six or eight miles an hour. The inherent improbability, and almost impossibility, of attaining such a speed in such a short distance is patent, and is supplemented by considerable testimony of experts that it would be absolutely impossible with the motor in use upon the car to attain a speed of twenty-five miles an hour within that distance, or within any distance less than two or three blocks. Assuming, however, that there was sufficient testimony to go to the jury upon the subject of excessive and negligent speed, it is very evident that, unless such negligent speed was the proximate cause of the injury, there can be no recovery on this ground: *Pletcher v. Scranton etc. Co.*, 185 Pa. St. 147, 39 Atl. 837. If the boy ran unexpectedly in front of the car and the motorman had no reason to expect any such action on his part, and the accident would have happened in the same way had the car been going at a normal and reasonable speed, then it cannot be said that the speed was the proximate cause of the injury. The accident, in that event, was caused by the sudden and unexpected movement of the boy, and not by the negligence of the motor-

man: Funk v. Electric Traction Co., 175 Pa. St. 559, 34 Atl. 863.

Careful examination of all of the evidence of the eyewitnesses of the accident, including that of the boy himself, convinces us that it was practically undisputed in the case that the boy unexpectedly stepped or ran in front of the car when only a few feet distant, and when it could not have been stopped, nor effective warning given, before it ran over him, whatever its speed. It is true that the boy himself testified that he ran into the middle of the track and got the peanut and was standing still, eating it, and had been so standing for a few minutes when he was struck by the car; but this evidence is not only impossible under the admitted facts but is at variance with the testimony of all * the other witnesses who saw the accident, and is also denied by the boy himself. During his cross-examination he said that it took him about a second to get the first peanut which he picked up between or on the tracks, that, if the car had not struck him, it would have been about a second more when he got the other one; that the moment he got the first one he was going to get the other one, and the car struck him while he was in the act of moving; that he knew what a second was; that the clock ticks about once a second, and it took him just about that long to go from the curbstone to the first track, and would have taken him about two seconds to get the other one if the car had not hit him. This was repeated in substance two or three times. The boy who threw the peanuts, who was ten years of age, testified that Rex had gone across the west track, and stood between the tracks; that some boys hollered at him, and he jumped right in front of the car, and it struck him. Dr. Sarazin, who was standing on the sidewalk, and saw the peanuts thrown, and the boys start after them, did not keep his eye upon them, but saw Rex on the track, looking east, when the car was about ten feet from him and at once shouted to the motorman. A young man eighteen years of age, who saw the accident from the sidewalk on the east side of the street, testified that he heard somebody yell, and looked, and saw the boy jump right in front of the car; that he ran from the east right in front of the car, and was knocked down. The motorman testified that when he started from Belknap street no one was on the track; that he saw some boys playing on the west side of the street about the curbstone; that all of a sudden they scattered, and were grabbing after something; that one chased another, and came to

within three or four feet of the track and stopped, and one stooped to pick up something, and then jumped out in the middle of the track in front of the fender; that he (the motorman) was about eight feet from the boy when he "stooped to pick up something, and that he then had thrown off the power and hollered at the boy, and was reaching for the reverse, and in that time the boy jumped in front of the car. The only other witness of the accident who testified was a man who sat on the curbstone at the southwest corner of Tower avenue and Belknap street, who testified that as he sat there he saw three boys start to run across the track; that the street-car passed going south very rapidly, and that almost instantly as the car passed he saw two boys cross on the other side of the track; that the third boy was under the car; that he did not see him hit, and did not know which way he was looking, nor how he got struck; that it was all done very quickly—in a second or two.

As will be seen, there is nothing in all this evidence, except the palpably impossible statement of the boy himself, which he afterward contradicted, which brings the boy upon the track more than ten feet in front of the car. The conclusion that he stepped or ran in front of the car when only a few feet distant is irresistible; in fact, the evidence will sustain no other. The testimony is unanimous that the car could not be stopped within this distance, whether it was going twenty-five miles an hour or six miles an hour. The most of the witnesses who testify on the subject say that a car going eight miles an hour could not be stopped short of about sixty feet. It is true one witness says that an emergency stop could be made inside of fifteen feet, but he afterward says that this fifteen feet would be after the power is actually applied on reversal, and that it would take about thirty seconds before the power got hold of the car.

So the case presented is one of the sudden and unexpected action of the boy in running in front of the car. We see no reason to say that the motorman could reasonably anticipate such action on the part of the boy, and hence his failure to anticipate it cannot be called negligence: *Eastwood v. La Crosse City Ry. Co.*, 94 Wis. 163, 68 N. W. 651.

⁸ A minor error was committed on the trial affecting the measure of damages. The plaintiff was allowed to testify as to his pecuniary condition, the amount of his property, his earnings, and the size of his family. This was error in an action for loss of services, under the ruling of this court in the case of *Rooney v. Milwaukee etc. Co.*, 65 Wis. 397, 27 N. W. 24.

By the Court. Judgment reversed, and action remanded for a new trial.

• Cassoday, C. J., took no part.

IN RYAN v. LA CROSSE CITY RY. CO., 108 Wis. 122, 83 N. W. 770, a boy only eight years and nine months old was held, as a matter of law, to be guilty of contributory negligence, where it appeared that he was struck and injured by a street-car while he was attempting to cross the tracks; that he was a boy of unusual intelligence, and had lived opposite the place of the accident for two years; that he was accustomed to cross the tracks daily to attend school, and knew all about the situation; that he had just seen a car pass on one of the tracks and knew that the cars going in the other direction, one of which struck him, run on the other track; that there was nothing to prevent him from seeing the approaching car or to divert his attention; that he did not look to see whether a car was coming on that track; and that his own testimony was contradictory as to whether he listened for it.

"It seems to be settled," said Cassoday, C. J., in delivering the opinion of the court, "that where, as here, it appears from the undisputed evidence that the plaintiff, considering his age and intelligence, did not exercise proper care in crossing the track, the trial court may determine, as a proposition of law, that the plaintiff is guilty of contributory negligence and cannot recover": Citing Ewen v. Chicago etc. Ry. Co., 38 Wis. 614; Strong v. Stevens Point, 62 Wis. 255, 22 N. W. 425, in each of which cases the injured boy was only eight years old; Reed v. Madison, 88 Wis. 171, 53 N. Y. 547. He then cited cases showing that in Massachusetts an action for damages for the death of a boy eight years and one month old, by reason of the alleged negligence of the motorman, cannot be maintained where it appears "that the car could be seen for a considerable distance as it was approaching, and its sound could be plainly heard; that the boy's view was unobstructed; that the railway had but a single track, and the distance from the curbstone of the narrow sidewalk to the nearest rail was only about twelve feet; and that he ran rapidly from the walk to the track in front of the car, and no reason or excuse was disclosed for his so doing": Morey v. Gloucester St. Ry. Co., 171 Mass. 164, 50 N. E. 530; that in New York "a child between eight and nine years of age, who attempts to cross a city street in the middle of a block, either without looking for an approaching street-car or in blind and heedless disregard of its rapid approach, is guilty of contributory negligence": Weiss v. Metropolitan St. Ry. Co., 33 App. Div. 221; 53 N. Y. Supp. 449, and cases there cited: that in New Jersey, a verdict cannot be supported in favor of a boy nine and one-half years of age, playing in a public street, who runs across the track of a trolley-car, and is

struck and injured by a passing car, where there was no obstacle to his seeing the car if he had looked before going on the track, and he testifies that he neither saw nor heard the car: *Brady v. Consolidated Traction Co.*, 64 N. J. L. 373, 45 Atl. 805; that a similar rule has been applied in that state to a girl nine years old, injured while attempting to cross a street railway track: *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674, 46 Atl. 608; and that in Pennsylvania, "in an action against a street railway company to recover damages for the death of a boy twelve years old, a nonsuit is properly entered where the evidence shows that the deceased, while playing with other boys upon the street at the time of the accident, ran upon one side of the railway tracks without paying any attention to the approach of a car, a few feet away, and then, hearing a shout from some companions, stopped, looked in the wrong direction and was struck by the car": *Pletcher v. Scranton etc. Co.*, 185 Pa. St. 147, 39 Atl. 837. His honor was, therefore, of the opinion that the judgment of the circuit court for the plaintiff could not be sustained, unless it could be said from the record that the motorman was guilty of gross negligence; and that to constitute such negligence the facts must have shown such a degree of rashness or wantonness on the part of the motorman as to evince a total want of care for the safety of the plaintiff: *Lockwood v. Belle City St. Ry. Co.*, 92 Wis. 97, 65 N. W. 806, and cases there cited; *Schug v. Chicago etc. Ry. Co.*, 102 Wis. 515, 78 N. W. 1090. But as there was nothing in the record to indicate that the motorman was guilty of any such rashness or wantonness the judgment of the circuit court for the plaintiff was reversed.

Dodge and Winslow, JJ., dissented from the view of the majority, in *Ryan v. La Crosse City Ry. Co.*, 108 Wis. 122, 83 N. W. 770, that the conduct of the injured boy could properly be declared negligence in law. In the opinion delivered by Dodge, J., and concurred in by Winslow, J., it was said: "In *Lofdahl v. Milwaukee etc. Ry. Co.*, 88 Wis. 421, 60 N. W. 796, a boy sixteen years old, wholly familiar with the movement of trains in the locality in question, was held to be negligent in law; but in *Johnson v. Chicago etc. Ry. Co.*, 49 Wis. 529, 5 N. W. 893, 56 Wis. 274, 14 N. W. 181, a boy six years and nine months old was said to be too young to be guilty of contributory negligence as a matter of law. In *McVoy v. Oakes*, 91 Wis. 214, 64 N. W. 748, the same thing was said of a boy seven years old; and in *Carmer v. Chicago etc. Ry. Co.*, 95 Wis. 513, 70 N. W. 560, it was said, on authority of the last-named case, that a boy eight and a half years old was certainly not guilty, as a matter of law, of contributory negligence for climbing through a freight train, although the same conduct by an adult would have been held negligence by the court. It was there also said that, generally speaking, the question of a child's due care is for the jury. Thus, it has apparently been determined by this court that it cannot be said, as matter of law, that conduct on the part of a child either

six, seven, or eight and a half years old is contributory negligence. Just where the line falls between that age and sixteen, when it ceases to be exclusively for the jury and may be clear enough to be passed upon by the court, has heretofore been undetermined. In *Shearman and Redfield on the Law of Negligence*, fifth edition, 112, it is said that the question of the power and duty of any child between three and twelve years to exercise care for its protection is held to be for the jury. All of the previous decisions of this court are consistent with that statement. Thus, in the following cases the question was held to have been properly one for the jury, and the conduct of the trial court in submitting it met the approval of this court: *Ewen v. Chicago etc. Ry. Co.*, 38 Wis. 613, where a nine year old boy started to run across railroad tracks, and stopped on the track, when a train was approaching close at hand and ran over him; *Hemmingway v. Chicago etc. Ry. Co.*, 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804, where an eleven year old boy jumped from a moving train as it was passing his station; *Whalen v. Chicago etc. Ry. Co.*, 75 Wis. 654, 44 N. W. 849, where a thirteen year old boy walked one hundred feet on a railway track in plain sight of an approaching train but did not observe it. It was said: 'Had he been an adult, we should be strongly inclined to hold that contributory negligence on his part was conclusively proved. But he was not an adult. He was a little less than thirteen years old. Under well-settled rules of law, the court properly submitted to the jury the question of the degree of diligence required of him.' These are the principal cases in our own court in which the question of juvenile negligence has been discussed, and they seem to sustain two propositions: The one above stated, that with very young children the question must always be for the jury, unless, indeed, they are so young that the court must say they could not, under any circumstances, be chargeable with negligence; and, secondly, that above that age it is generally a jury question, and the circumstances must be very exceptional which justify the court in assuming to decide the question. Under the law as established in this state it seems to me certain that no court can properly hold that any conduct by a boy of the age of this one is negligence per se and as matter of law, but that the question must always be open to difference of opinion, so that it must be submitted for the unanimous decision of a jury of ordinary citizens." And the learned dissenting justices were of the opinion that if the rule were otherwise than as above stated by them, the question of the boy's negligence should, under the circumstances of the particular case, have been submitted to the jury.

STREET RAILWAYS—INJURY TO CHILD IN STREET—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.—It is very generally conceded that a child under five years of age is not capable of contributory negligence, but capacity changes with age, and the question of negligence becomes one for

the jury with the increase of years: Note to *Roanoake v. Shull*, 75 Am. St. Rep. 798. It is not negligence per se for parents to permit infants to be upon the streets of a city: *West Chicago St. R. R. Co. v. Llderman*, 197 Ill. 463; 79 Am. St. Rep. 226, 58 N. E. 367; but the question as to whether they have been negligent in so doing so as to prevent a recovery for injuries occasioned by street-cars and various other agencies to their children, through the negligent acts of third persons, is generally a question for the jury: See the monographic note to *Harnes v. Shoreport City R. R. Co.*, 49 Am. St. Rep. 407, on negligence in dealing with children; *Fox v. Oakland etc. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

STREET RAILWAYS—CHILD DARTING IN FRONT OF CARS—INJURY—LIABILITY.—It is not negligence per se for one to be upon the tracks of a street railway: *Thatcher v. Central Traction Co.*, 106 Pa. St. 66, 45 Am. St. Rep. 645, 30 Atl. 1040; and the rapid running of street-cars between crossings is not negligence: *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. 140. Street railways, when exercising due care, are not answerable to a person who, in a careless, reckless, absent-minded way, runs suddenly in front of a moving car and is injured before there is time to stop it: *Driscoll v. Market St. etc. Ry. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; and a child injured by running in front of a cable-car cannot recover if the gripman operating the car was free from negligence: *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509, 17 Am. St. Rep. 591, 12 S. W. 652. The same rule applies to steam railways: *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 609, 41 Am. St. Rep. 700, 19 S. E. 730; but in cases where a child comes suddenly and unexpectedly upon a street railway track and is injured, it is generally a question for the jury as to whether the railway company was negligent: *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. 140; *Johnson v. Reading etc. Ry.*, 160 Pa. St. 647, 40 Am. St. Rep. 752, 28 Atl. 1001; *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, 34 Am. St. Rep. 690, 25 Atl. 650.

STATE v. McDONALD.

[108 Wis. 8, 84 N. W. 171.]

JURY TRIAL—RIGHT TO.—PROCEEDINGS TO TRY THE TITLE TO AN OFFICE constitute a civil action in which controverted questions of fact are triable by a jury as a matter of right.

NATURALIZATION—EVIDENCE OF—ADMISSIBILITY.—In an action in one state to try title to an office, the record of the defendant's late naturalization proceedings in another state is admissible in evidence, not only as an admission against interest but as to a former adjudication of a material fact, where the issue is whether or not the defendant is an elector of the former state.

JUDGMENT—RES JUDICATA—WHAT FACTS ARE INCLUDED.—A judgment is binding upon parties and privies as to the final result pronounced and the facts established or assumed upon which it is based.

JUDGMENT—RES JUDICATA—EXTENT OF RULE.—The rule of *res judicata* extends to every proposition assumed or de-

cided by a court, upon which the final conclusion is based, and this includes the status of a person where that is the subject upon which the judgment acts.

NATURALIZATION—CONCLUSIVENESS OF.—Judgments of naturalization fix the status of the naturalized person irrevocably, and necessarily include all the facts upon which they are based. The result is binding upon the world, not only as to the ultimate fact established, but the facts upon which it rests.

NATURALIZATION—RES JUDICATA.—If a court, on an application in another state for citizenship, adjudges that the applicant was a resident of that state for one year immediately preceding the application, this adjudication is conclusive of the same question in this state, when its truth is vital to a question here, whether the federal statute calls for that particular year's residence or not.

Action to try the title of defendant McDonald to the office of lumber inspector. The cause was tried by the court with a jury. The record of the proceedings of the Minnesota court naturalizing defendant on November 18, 1898, was received in evidence against a general objection, and was held conclusive as to the defendant upon the question of his eligibility to the office. A verdict was directed for the plaintiff, and the defendant appealed. A qualified elector, under the laws of Wisconsin, is one who shall have resided in the state for one year next preceding an election.

Ross, Dwyer & Hile and W. D. Dwyer, for the appellant.

Victor Linley, for the respondent.

11 MARSHALL, J. It is evident that the verdict was directed in plaintiff's favor either on the theory that the record of defendant's application for citizenship was conclusive against him as to his place of residence during the time covered by such record, or that the verdict of the jury, in any event, would be only advisory to the court. Both theories are contended for in support of the judgment.

This is a civil action under section 3463 of the Statutes of 1898, and governed thereby and by the established principles respecting such actions. We need not discuss the question of whether, in quo warranto proceedings at common law, contested questions of fact were triable by a jury as a matter ¹² of right, or whether the authorities are uniform as regards such being a matter of right under the reformed procedure in code states where there is no express constitutional or statutory regulation of the subject. There is some conflict of decisions in regard to the matter: 17 Ency. of Pl. & Pr. 479. It is said that it appears to be the general practice to submit all issues of fact in

informations in the nature of quo warranto to a jury, and to proceed in the trial of such actions according to the course of the common law. In states where a civil action has been substituted for the common-law proceeding to try title to an office, it is deemed to be a legal action and within the constitutional guaranty of the right to trial by jury. In *People v. Doesburg*, 16 Mich. 133, it is said that the court has no right to deprive a party of his right to trial by jury where there is an issue of fact in quo warranto. In *People v. Albany etc. R. R. Co.*, 57 N. Y. 161, the subject received careful consideration, and it was held that an action in the nature of quo warranto is one of strict legal cognizance and hence that the parties have a constitutional right to have all issues of fact tried by a jury. The right of trial by jury is clearly recognized by our statutes. Section 3464 provides that: "Actions of quo warranto and scire facias shall be tried at special as well as at general terms of the circuit court, and the court shall have the power to summon a jury for the purpose and prescribe the manner of summoning the same." It is evident that the clause in regard to summoning a jury was added to the statute because of a preceding clause in regard to the trial of such actions at special terms where the statutes do not provide generally for the summoning of jurors. In an action of this kind commenced here, it has been clearly indicated that the right of trial by jury is absolute, and that the action should not be delayed because of the necessity for a jury trial of the issue of fact, by sending the cause to a circuit court, but that a jury should be called in this court: *State v. Messmore*, 14 Wis. 115.

¹³ There is little room for controversy on the subject of whether issues of fact in actions of quo warranto are triable as a matter of right by a jury. They are clearly legal actions under the code, to be tried the same as any other such action, except, on account of the importance of a speedy determination of the controversy, they are triable at a special as well as at general terms, and jurors may be summoned for that purpose when necessary.

The record of the proceedings in the Minnesota court was admissible in evidence; 1. Upon the general principle that self-serving admissions may be shown against the party making them, where the subject thereof is in controversy; 2. By the rule that a judgment is binding upon parties and privies as to the final result pronounced and the facts established or assumed upon which it is based.

If the evidence were admissible only on the first ground stated, the court was not justified in taking the case from the jury, but if it was admissible on the second ground—and we hold that it was—the evidence was conclusive of the fact in issue, and the direction of the verdict was proper.

There are many cases where persons do not appear of record by name and cannot be heard directly in the action, yet are deemed parties by representation and are bound by the judgment as effectually as those who stand in court to represent them. In such cases all such parties are deemed to be in privity with those who actually appear of record. A judgment against a corporation is conclusive against its stockholders in an action to enforce their statutory liability to creditors. A person suing as a taxpayer, in behalf of himself and all persons similarly situated, stands for all such taxpayers, so that a judgment rendered in the action is binding on every taxpayer in the municipality. A judgment against a municipality is binding on all its taxpayers in a proceeding to collect a tax to satisfy the judgment. Each taxpayer is considered as a participant in the litigation ¹⁴ closed by the judgment, so that he can neither impeach the judgment collaterally nor relitigate any of the questions decided upon which the judgment was based: *Clark v. Wolfe*, 29 Iowa, 197; *State v. Rainey*, 74 Mo. 229; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161. A judgment against a trustee is binding on his cestui que trust. So is an adjudication by a county court, as to a guardian's or administrator's account, binding on all interested, including the bondsmen. A judgment declaring a person insane and placing him under guardianship is conclusive as to such person's mental status and competency to do business. Many more examples might be given. Such actions are regarded as actions in rem. While a judgment in an action in personam is binding only on the parties of record and those claiming under them, a judgment in rem renders the subject on which it operates "what it declares it to be" and is consequently binding upon the world. Every person is supposed to be concerned in such an adjudication and to be constructively before the court. Such actions, of course, should not be confused with those which concern property, yet only involve personal rights in regard thereto—rights in which the public generally are not interested—such as actions to enforce liens and to reach property by attachment and subject it to payment of the plaintiff's claim. Many examples might be given where the res involved,

which classified the action as one in rem, was the legal status of the person, as, for example, the legal settlement as regards right of public support: *Cabot v. Washington*, 41 Vt. 168; the condition as regards whether married or single: *Hood v. Hood*, 110 Mass. 463; *Smith v. Smith*, 13 Gray, 209; *Pennoyer v. Neff*, 95 U. S. 714.

The rule of *res adjudicata* is as broad where status is the subject upon which the judgment acts, in that it is binding on the whole world, as it is inter partes where mere personal rights are the subject of the litigation. That is well illustrated ¹⁸ in *Pittsford v. Chittenden*, 58 Vt. 49, 3 Atl. 323, where it was held that a judgment determining the settlement of an illegitimate child was conclusive in a subsequent action involving the settlement of the mother, because that was an essential fact in the first proceeding. "Whatever has been necessarily decided," said the court in substance, "in reaching the final result, must stand unimpeached. The controlling facts upon which the former adjudication was rested, though not directly in issue, cannot be reviewed collaterally. They are to be deemed material to the judgment and conclusively settled by it."

Judgments of naturalization are governed by the same rules. They fix the status of the naturalized person irrevocably, and necessarily include all the facts upon which they are based: *Black on Judgments*, sec. 804; *State v. Hoeflinger*, 35 Wis. 393; *Spratt v. Spratt*, 4 Pet. 393; *McCarthy v. Marsh*, 5 N. Y. 263. In such a proceeding every person is regarded as a party actually or constructively. It is no answer to the rule as applied to this case to say that the judgment naturalizing appellant is not conclusive as to his having resided in the state of Minnesota for the year preceding his application, because that particular year's residence was not essential to the judgment; that any year within the five years of residence required within the United States is sufficient. Whether the suggestion that the one year's residence within the state is not required to be the year immediately preceding the application for citizenship is a correct construction of the federal statute need not be decided in this case. It is sufficient that the record shows that the court pronounced judgment upon evidence establishing one year's residence within the state of Minnesota immediately preceding the application. The truth of that evidence was the turning point in passing upon appellant's application. It was therefore material regardless of whether the particular year's residence covered by the proof was essential ¹⁹ or not. The point falls squarely within the rule that

every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based, is as effectually passed upon as the ultimate question which is finally solved: *Brown v. Chicago etc. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771; *State v. National etc. Soc.*, 103 Wis. 208, 79 N. W. 220; *School Trustees v. Stocker*, 43 N. J. L. 115.

It follows that the ruling of the trial court, that the Minnesota court, in the application for citizenship, adjudged that the applicant was a resident of that state on November 18, 1898, and that such judgment is conclusive of the same question in this action, is correct. That being the case, obviously appellant was not eligible to the office of lumber inspector when he received the appointment thereto or when he entered upon the duties thereof, and respondent was entitled to hold the office when this action was commenced and when it went to judgment. The verdict was properly directed.

By the Court. The judgment is affirmed.

QUO WARRANTO—CIVIL REMEDY—JURY TRIAL.—An information in the nature of quo warranto is a civil remedy: *Distilling etc. Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495; and the issues of fact raised thereon may be tried by a jury: See the monographic note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 44, 52, on pleadings and proceedings in quo warranto; contra, see the monographic note to *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 185, 190, showing in what cases the legislature may dispense with a trial by jury. See, also, *State v. Doherty*, 16 Wash. 382, 53 Am. St. Rep. 39, 47 Pac. 958.

JUDGMENT—RES JUDICATA—EXTENT OF RULE AS TO FACTS.—A judgment of a court of competent jurisdiction is binding between the parties to the action, regarding the subject matter thereof, either as a plea in bar or evidence in estoppel, not only as to every question actually presented and considered, and upon which the court rested its decision, but upon every point within the issues that might have been presented and decided in the case, and is likewise conclusive in any subsequent action between the same parties, upon a different subject matter, as to every question actually litigated and decided in the former action: *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599; but see *Mauldin v. City Council*, 53 S. C. 285, 69 Am. St. Rep. 855, 31 S. E. 252. A judgment is conclusive, if on a direct point, though the object of the two suits is different: *Gallaher v. Moundsville*, 34 W. Va. 730, 26 Am. St. Rep. 942, 12 S. E. 859; and see *Mauldin v. City Council*, 53 S. C. 285, 69 Am. St. Rep. 855, 31 S. E. 252.

EDWARDS v. H. B. WAITE LUMBER COMPANY.

[108 Wis. 164, 84 N. W. 150.]

LIENS UPON LOGS, TIMBER, ETC.—HIRE OF HORSES NOT USED BY THE CLAIMANT OR HIS AGENT.—Under a statute giving a lien to "any person" performing labor or services upon logs, timber, etc., such person may claim a lien for labor or services performed by himself, or by his agent or servant, including their value as enhanced by the use of teams; but the statute cannot be so extended as to allow a lien for the hire of horses not used by the claimant himself, or by some person as his agent or servant, although they were rented for the express purpose of being used in such work.

Action by Edwards against the H. B. Waite Lumber Company. The plaintiff hired six teams of horses to the defendant Mellen Lumber Company, to be worked in hauling certain logs, and the company so used them, but did not pay for the value of their services. A personal judgment was rendered against the company, but Edwards also demanded a lien upon lumber produced from the logs, and which had been purchased, in good faith and without notice, by the defendant H. B. Waite Lumber Company. The statute gave a lien to "any person" performing labor or services upon logs, timber, etc. The claim for a lien was dismissed, and the plaintiff appealed from this portion of the judgment.

Ben S. Smith, for the appellant.

G. N. Risjord, Tomkins & Merrill, and George F. Merrill, for the respondent.

¹⁶⁵ DODGE, J. The liberal construction properly accorded to the log lien statutes was given full effect in *Hogan v. Cushing*, 49 Wis. 169, 5 N. W. 490, where it was held that the labor in cutting or hauling logs might be done not only by the lien claimant but by his servants or agents, and that the lien might extend to the value not only of the personal labor of the claimant ¹⁶⁶ and his servants; but so as to include the value of that labor as enhanced by the use of his teams. Further extension of construction was denied when an attempt was made to enforce lien for labor of the claimant's ox not used by himself or his agent or servant, but hired to another (*Lohman v. Peterson*, 87 Wis. 227, 58 N. W. 407), and when lien was claimed for the value of the use of claimant's machinery when not operated by himself or his agents, but hired to another: *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706.

The present case obviously falls within the reasoning of the latter decisions. The statute (Stats. 1898, sec. 3329), according to its strict terms, would justify a lien only for labor or services done or performed by the claimant himself. Certainly, due liberality of construction has been accorded in holding that it may include labor or services done by another, and such construction can only be sustained by application of the maxim, *Qui facit per alium facit per se*. This maxim, however, is limited to acts done through another person, and cannot justify the idea that one can confer agency upon animals or machinery so that work effected by them shall be deemed to be labor or services done by him, where such animals or apparatus are not used and operated by the claimant or by some person as his agent or servant. The circuit court rightly held that the plaintiff was entitled to no lien for the hire of his horses when rented to another, although rented for the expressed purpose of enabling that other to perform work of a lienable character.

By the Court. Judgment affirmed.

LIENS—HAULING LOGS—HIRE OF HORSE NOT USED BY THE CLAIMANT OR HIS AGENT.—Under a statute providing that a person may have a lien for personal services and services performed by his team, one who lets his horse by the month to another to work in hauling lumber is not entitled to any lien on the lumber hauled: *McMullin v. McMullin*, 92 Me. 338, 69 Am. St. Rep. 510, 42 Atl. 500.

MCDONALD v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

[108 Wis. 213, 84 N. W. 154.]

LIFE INSURANCE—PROOF BY CIRCUMSTANCES THAT NOTE WAS GIVEN AS PAYMENT OF PREMIUM.—If a question arises as to whether a note given to a life insurance company was taken as mere evidence of a debt, or as part payment of the first premium on an application for insurance, the burden is upon him who asserts that it was taken as payment of the premium, and if the circumstances relied on to prove the contract point one way as reasonably and significantly as the other, there is presented a question of law for the court to decide.

LIFE INSURANCE—FIRST PREMIUM—PAYMENT OF, WHEN NOT WAIVED BY TAKING NOTE.—IN AN ACTION upon a life insurance policy, where the defense is that the first premium was not paid, or payment thereof waived, and that the policy never went into effect, there can be no recovery where the evidence shows that the application was accompanied by the applicant's ten-day note for the amount of the first premium, together with a mem-

orandum indorsed on the note that it was to be returned if not accepted; that the application and policy both provided that the insurance should not become binding until the first premium was actually paid, but that the risk was accepted by a general agent having power to bind the company by a waiver of this provision; that the agent, upon receiving the policy and customary voucher or receipt, tendered them to the applicant and demanded payment of the note; that the maker excused nonpayment, whereupon the agent delivered the policy to him, but retained the voucher and the note; that the agent then left the note, with the voucher, in a bank for collection, with directions that the voucher be delivered upon payment of the note; that, at the maker's request, the time for payment of the note was extended, such extension being made, however, as an extension of the time for payment of the premium; and that the applicant died without paying the note, as no express agreement to waive the provision as to payment of the premium and to accept the note in lieu thereof is thereby shown. Nor does evidence that the note was taken to "tie" up the insured show, or even tend to show, that the obligation to pay should be deemed an actual payment. Under such circumstances, the court should direct a verdict for the defendant.

Action to recover on an insurance policy upon the life of Donald McDonald. The application was taken by one Harris, a general agent of the defendant society. The situation of the case is quite fully shown in the second syllabus, *supra*. McDonald died in about a week after the time to which his note had been extended, without having paid it, and the society was ignorant of its existence. Upon its discovery, the society demanded the policy, which demand was refused. All the conditions precedent to a recovery on the policy were performed, if it was in force at the time of McDonald's death, and this action was brought by the beneficiary to enforce payment. The defendant's motion for a verdict to be directed in its favor was denied. The jury rendered a special verdict, finding that the policy was manually delivered by Harris to McDonald; that such delivery was made with the understanding that the policy should, from the time of its delivery, stand as a completed contract of insurance; that the note was accepted as a payment of the first premium; and that Harris, on behalf of the society, waived the terms of the policy providing that it should not go into effect until payment of the first premium. Judgment was accordingly entered for the plaintiff, and the society appealed.

Winkler, Flanders, Smith, Bottum & Vilas and E. P. Vilas, for the appellant.

Bump, Kreutzer & Rosenberry and M. B. Rosenberry, for the respondent.

²¹⁶ MARSHALL, J. Several assignments of error which are discussed at considerable length in the briefs of counsel do not need attention because of the conclusions we have reached on the main question in the case, that is, whether the note was taken in payment of the first premium upon the policy. We shall discuss that question, assuming for the purpose of it that the policy was delivered to McDonald to be retained by him.

It is conceded that Harris was a general agent of the society, not a mere local agent, and as such had authority, at the time of the delivery of the policy, to bind his principal by an agreement waiving the provision of the policy calling for actual payment of the first premium thereon as a condition ²¹⁷ precedent to its going into effect; so we need not take time to discuss any question in that regard. The authorities are in substantial harmony in respect to the subject: Joyce on Insurance, sec. 77, and notes. It is also conceded that the condition of the policy, as to its not going into effect in advance of actual payment of the first premium, is fatal to plaintiff's right to recover unless it was waived by the assurer through its agent Harris, and that whether there was such a waiver depends on whether McDonald and Harris expressly agreed that the former's note, given with his application for the insurance, should operate as such payment. The trial court rightly so held, though several dependent questions were submitted to the jury for decision in addition to one covering the vital point in the case. The jury found in plaintiff's favor on such point, also that down payment of the first premium was waived. That is, they said the note was taken by the society as a down payment of the first premium, and that such payment was waived. The literal sense of the language used in the two findings is conflicting; but it is reasonable to suppose that the jury intended to say that payment of the first premium in money was waived and that the note was taken in lieu thereof. We so interpret the verdict.

It follows that a negative answer to this simple question requires a reversal of the judgment appealed from: Was there any credible evidence tending to show that it was expressly agreed between McDonald and Harris that the former's note should be considered as an actual payment of the first premium upon the policy? It has sometimes been said in legal actions that where there is any evidence to establish the existence of a fact and there is also evidence to the contrary, a question is presented for solution by a jury, and that their determination, affirmed by the trial court by a refusal to set aside the verdict

and grant a new trial, cannot be disturbed on appeal. That is misleading as the language is ²¹⁸ often understood. Evidence does not tend to establish a fact in a legal sense unless it reasonably points to the probable existence thereof, and so as to produce conviction, to a reasonable certainty, in the mind of a person of common sense, that it does exist. Facts can properly be determined by a jury only by applying human reason and common sense to evidence. Every such determination should be based on reasonable probabilities established by evidence, not on mere possibilities or conjectures: *O'Brien v. Chicago etc. Ry. Co.*, 102 Wis. 628, 78 N. W. 1084.

In considering this case there must be kept prominently in mind the settled rule that the taking of a note for the debt of the maker, whether such debt be created at the time of such taking or prior thereto, *prima facie* makes the note only evidence of the indebtedness, and that such rule must prevail in the absence of evidence establishing an express contract making the note a payment of the debt: *Aultman v. Jett*, 42 Wis. 488. There must also be kept prominently in mind the rule that an express contract is one where the parties to it state in writing or verbally the terms thereof: 1 *Parsons on Contracts*, 8th ed., 7, note 1. Such a contract can only be established by evidence sufficient to produce conviction to a reasonable certainty, that the terms of it were stated between the parties and agreed upon—not conviction in the mind of a reviewing court, but in the mind of any person exercising common sense to discover the truth from the evidence.

Applying the rules indicated, we have been unable to discover in the record any evidence to support the finding of the jury that an express contract as to the taking of the note in payment of the first premium upon the policy was made. There was not a word of evidence from the mouth of any witness to that effect, nor any circumstance that is not just as consistent with the view that the note was taken as mere evidence of indebtedness, as with the view that it ²¹⁹ was taken as payment of the premium. The burden of proof to establish the claim that the note was received as a payment of the premium was on plaintiff, and, while an express contract may be established in whole or in part by circumstantial evidence (*Leitgabel v. Belt*, 108 Wis. 107, 83 N. W. 1111), mere circumstances that point one way as reasonably and significantly as the other are insufficient for that purpose. In such a situation the controversy should not be submitted to the jury.

It involves a question calling for the exercise of the judicial function to declare the right as a matter of law. But if the question is submitted to a jury and they be permitted to guess or conjecture as to where the truth lies, if the result is contrary to the legal conclusion which the court should declare, it ought not to be allowed to stand as a correct determination of the rights of the parties: *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729; *Cawley v. La Crosse City Ry. Co.*, 101 Wis. 145, 77 N. W. 179. It is often said, and is the settled law, that where there is but one reasonable inference it is the duty of the court to draw it as a matter of law; but where the evidence will admit of conflicting reasonable inferences the proper inference is to be drawn by the jury. It is just as true that, where there are conflicting reasonable inferences, and the situation will not reasonably admit of a decision that those pointing one way preponderate over those pointing the other, as a matter of law, the case, from the standpoint of the party on whom the burden of proof rests, fails, and the question presented for decision is one of law for the court.

Counsel for respondent point with confidence to the memorandum on the note to the effect that it was to be returned if not accepted, and the evidence that the note was taken "to tie McDonald up." Neither such circumstance nor such evidence shows or tends to show that the parties expressly agreed that the obligation to pay should be deemed an actual payment. Such evidence, direct and circumstantial, at most indicates an agreement that McDonald would pay the first ²²⁰ premium at the due date of the note—not that the note should be equivalent to such payment. That such was the actual understanding is evidenced by the fact that the customary receipt for the first premium, given to policy holders upon making payment thereof, was retained by Harris with the note to be delivered to McDonald upon his paying the same. The evidence shows that the extension of the time for payment of the note to November 15, 1898, was made as an extension of time for payment of the first premium upon the policy. The bank that held the note for collection was informed by Harris that the time for the payment of the first premium was extended to November 15th, and at the same time the receipt referred to was delivered to the bank with directions to turn it over to McDonald upon his paying the note. The provision in the policy, postponing its effect as an insurance contract till payment of the first premium, contemplated a

delivery of the policy to McDonald subject to such provision, so that in case of payment of the first premium not being made till a later day the liability of the society would be postponed accordingly. So the delivery of the policy in advance of payment of the first premium does not point to the probability of a waiver of the provision that the liability under such policy should not antedate actual receipt by the society of such premium in money, nor does any other evidence that we can find in the record.

Further discussion of the case seems to be unnecessary. As we view the evidence there was an entire failure of proof to show that Harris and McDonald agreed that the note should be considered as a cash payment of the first premium or in lieu of such cash payment, hence that the motion of appellant for the direction of a verdict should have been granted.

By the Court. The judgment appealed from is reversed and the cause remanded for a new trial.

INSURANCE—LIFE—WAIVER OF PAYMENT OF PREMIUM. THE INDIVIDUAL CREDIT of an insured person may be accepted as payment of premium by an agent of the company: *Sheldon v. Connecticut etc. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565. A general agent of a life insurance company may waive the payment of the premium and deliver the policy, and thereby make it a valid and subsisting contract of insurance, notwithstanding a provision in the policy that it shall not take effect until the premium is paid: *Note to New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 150, showing when a contract of insurance is complete. A provision in an insurance policy that the company shall not be liable thereon until the premium is actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract under an agreement that a credit shall be given for the premium: *Note to Griffith v. New York Life Ins. Co.*, 40 Am. St. Rep. 105.

IN RE ESTATE OF McCORMICK.

[108 Wis. 234, 84 N. W. 148.]

ADOPTION—COUNTY COURT—JURISDICTION.—A county court has jurisdiction to hear proof in the matter of the adoption of a child, and to determine whether the parents have in fact abandoned it, although the petition for leave to adopt fails to state all the facts essential to authorize such adoption, and no notice has been given to the parents, but this does not authorize it to adjudge an adoption not in conformity with the statute.

ADOPTION—COUNTY COURT—EXCESS OF JURISDICTION.—Under a statute which expressly prohibits the adoption of a child on the ground of abandonment, without the fact of abandon-

ment having been found by the county court, an order of adoption by that court without such a finding is in excess of its jurisdiction, and a subsequent finding of that fact by the circuit court does not give life to such adoption.

JUDGMENT—PRESUMPTION—SILENCE OF RECORD AS TO FACT.—No presumption will be indulged in favor of a judgment, where the record is silent as to some fact, if the presumption violates an express statutory requirement in a proceeding purely statutory.

Carl H. Mueller, Ryan, Hurley & Jones, T. C. Ryan, and M. A. Hurley, for the appellants.

Louis Marchetti, Mylrea & Bird, W. H. Mylrea, and C. B. Bird, for the respondent, administrator.

235 CASSODAY, C. J. This is an appeal from a judgment of the circuit court entered January 3, 1900, affirming an order of the county court entered May 9, 1899, appointing Carl Kronenwetter as administrator of the estate of Ellen McCormick, deceased. The order was made on the petition of Emory McCormick, claiming to be a son by adoption of Ellen McCormick, who died intestate March 18, 1899. Her husband, Thomas McCormick, died testate December 3, 1898. The facts in relation to such adoption, as appears from the record, are to the effect that December 20, 1880, Thomas and Ellen McCormick presented to the county court their verified petition that they were husband and wife, and were residents of the town of Easton, in Marathon county, and were desirous of adopting a child not their own by birth, to wit, Emory Brown, who was then an infant under the age of fourteen years, and was six years old; that John T. Callon and John Patzer, as guardians, had given their written consent to such adoption; that the petitioners were of sufficient ability to bring up the child and furnish him suitable nurture and education, having reference to the degree and condition of his parents, and praying for such adoption and the change of the child's name accordingly. Such written consent of Callon and Patzer accompanied the adoption, and recited that they were such guardians of Emory, who was six years of age, and was signed by them as "Poor Committee of Marathon County, Wisconsin," and bore date December 16, 1880. Neither the petition nor such consent named the father or mother of Emory or their residence. Upon such petition and consent the county court made and entered an order June 8, 1881, reciting that Emory Brown was an infant under fourteen years of age, and was six years of age; that Thomas and Ellen McCormick were desir-

ous of adopting him as their child; that "John Callon and John Patzer, guardians and poor commissioners," had given their consent in writing to such adoption; that the court was satisfied ²³⁶ with the identity and relations of the persons and that the petitioners were of sufficient ability to bring up and furnish suitable nurture and education for the child, having reference to the degree and condition of its parents; and that it was proper that such adoption should take effect. Thereupon it was ordered that from and after the date thereof Emory Brown should be, to all legal intents and purposes, the child of the petitioners, Thomas and Ellen McCormick; that the name of the child be changed to Emory McCormick according to the prayer of the petition. Such order fails to give the name or residence of either the father or mother of the child.

It appears in evidence that Emory's father and mother were divorced November 14, 1881; that July 10, 1893, Thomas McCormick made his last will and testament, wherein he gave and bequeathed to his adopted son, Emory McCormick, five dollars, and gave, devised, and bequeathed all the balance of his property to his wife, Ellen; that December 3, 1898, Thomas McCormick died, and thereupon such will was filed and admitted to probate; that March 18, 1899, Ellen died intestate; that March 21, 1899, Emory, as such adopted son, presented to the county court his verified petition for such appointment of such administrator of the estate of Ellen McCormick, deceased.

The trial court found, in effect, that Ellen McCormick died intestate, leaving property in the county; that the appellants were her brothers and sisters; that she left, her surviving, no husband or natural children nor child, and that the petitioner Emory Brown (McCormick), was the duly and legally adopted son of Ellen; and, as conclusions of law, that the county court properly granted the administration of her estate to the person so requested by him. The circuit court based such findings wholly upon a certified copy of the proceedings of the county court. From the judgment entered thereon accordingly, affirming the order of the ²³⁷ county court appointing such administrator, the brothers and sisters of Ellen bring this appeal.

The statute provides that the "administration of the estates of intestates shall be granted to some one or more" of the relatives therein named, and the order of their appointment, "as the county court might think proper, or to such person as the widow, surviving husband, or next of kin may request to have appointed, if suitable and competent to discharge the trust":

Stats. 1898, sec. 3807. Here the administrator was appointed on the petition and at the request of Emory Brown (McCormick) on the ground that he was the legally adopted son of Thomas and Ellen McCormick. The question recurs whether he was such legally adopted son. The appellants contend that the petition of Thomas and Ellen McCormick for the adoption of Emory was insufficient to give the county court jurisdiction, for the reason that it failed to state all the facts essential to authorize such adoption. The petition is far from being a model. It even fails to state the name or residence of Emory's father or mother. Nevertheless, we are constrained to hold that it was a sufficient compliance with the statute to give the county court jurisdiction to hear proof in the matter of the adoption of the child: Stats. 1898, sec. 4021. But that did not authorize that court to order or adjudge such adoption in violation of the next section of the statute: Stats. 1898, sec. 4022. That section declares that "no such adoption shall be made without the written consent of the living parents of such child, unless the court shall find that one of the parents has abandoned the child or gone to parts unknown, when such consent may be given by the parent, if any, having the care of the child." It further provides, in effect, that in case the parents are living and "have abandoned the child, such consent may be given by the guardian of such child, if any," and "that, unless the living parent or parents of a minor consent to such adoption, it shall be the duty of the court having jurisdiction" ²³⁸ to appoint a time and place for hearing such petition, and give notice thereof as prescribed. The substance of the order of the county court adopting the child is given above in the statement of facts. It does not find that the parents of the child, or either of them, had abandoned the child, much less that they, or either of them, were dead. It does not even mention the name or residence of either of them, and yet it appears from the record that they were both living in the county at the time; and there is no claim that they, or either of them, had notice of the proceedings, as required by the statute. Such being the facts, the order of adoption based upon the abandonment of the child by the parents, was clearly a nullity as against them: *Schiltz v. Roenitz*, 86 Wis. 31, 39 Am. St. Rep. 873, 56 N. W. 194.

Such want of notice to the parents, however, did not take away the jurisdiction of the county court to determine whether the parents had in fact abandoned the child: *Parsons v. Par-*

sons, 101 Wis. 76, 81, 82, 70 Am. St. Rep. 894, 77 N. W. 147. In that case it was said by my brother Marshall, speaking for the court, in effect, that "the fact of abandonment, judicially determined, was essential to the jurisdiction" of the court to order or adjudge such adoption. In that case the fact of abandonment was so judicially determined. In the case at bar it was not so determined. The statute quoted expressly prohibited such adoption on the ground of abandonment, without the fact of abandonment being found by the county court. To obviate the objection, it is said that the circuit court did find such abandonment. But that does not give life to such adoption by the county court without any finding of such abandonment. Counsel ask us to presume such finding by the county court, though never reduced to writing. It is true that in a certain class of cases, where the record is silent as to some fact, a presumption will be indulged in favor of the judgment: *Webb v. Meloy*, 38 Wis. 319; *Oakes v. Buckley*, 49 Wis. 592, 6 N. W. 321; *Mitchell v. Rolison*, ²³⁰ 52 Wis. 155, 8 N. W. 886. But we are not aware of any such presumption in violation of an express statutory requirement, and in a proceeding which is purely statutory. If the facts were such as to obviate the express prohibition of the statute, they should have been found by the county court. We must hold that the county court, in granting such adoption, acted in excess of its jurisdiction: *State v. Circuit Court*, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to reverse the order of the county court, and for further proceedings according to law.

ADOPTION—PROCEDURE.—A PETITION in adoption proceedings is fatally defective if it fails to state, in accordance with the requirements of a statute, the name and residence of the parents, whether the parents consent to such adoption, or that the parents deserted the child for one year next preceding the application: *Watts v. Dull*, 194 Ill. 86, 75 Am. St. Rep. 141, 56 N. E. 303. To give validity to adoption proceedings, they must have been conducted in substantial conformity with the statute: *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23. Consent lies at the foundation of statutes of adoption, and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject matter without it: *Ferguson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842. The law concerning the adoption by one person of the children of another is the subject of a monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210-231.

MARTIN v. MARTIN.

[108 Wis. 284, 84 N. W. 439.]

ADOPTION—WAGES—SERVICES OF CHILD—PRESUMPTION.—If a boy, taken into a family under defective adoption papers, renders services as a son, the presumption is that such services are not to be paid for, and this presumption can only be rebutted by proof, either direct or circumstantial, which establishes an express contract to pay for them.

ADOPTION—DEFECTIVE PAPERS—SERVICES—PRESUMPTION—AGREEMENT REBUTTING.—If a boy, taken by a woman into her family under incomplete or defective adoption papers, renders services as a son, the presumption that such services are to be gratuitous is rebutted by proof of an express oral contract with the parent of the boy that the woman would, at her death, leave him all her property, real and personal, notwithstanding that such a contract is void as to realty, because it is within the statute of frauds, and, being indivisible, is void as a whole.

ADOPTION—DEFECTIVE PAPERS—ACTION FOR SERVICES—STATUTE OF LIMITATIONS.—If a boy, taken by a woman into her family under incomplete or defective adoption papers, renders services as a son, which cease upon his majority, he may at that time, if entitled to recover therefor at all, make demand and bring his action and it would be no defense that the woman had made a contract to leave him her property at her death, if such contract is void, for a void contract could not extend the time of payment for the services. Hence, the six year statute of limitations then begins to run against such an action.

LIMITATIONS OF ACTIONS—PLEADING.—Under a statute which forbids the allowance of a claim against an estate which is shown to be barred by the statute of limitations, it is not necessary to plead the statute to such a claim.

TRIAL—FINDING—CONSTRUCTION OF.—Under the circumstances of this case, a finding of the jury that a person promised and agreed to devise real estate was held to be equivalent merely to a finding that there was an oral agreement to devise the property, and not a written one.

Claim against the estate of Catherine Martin for personal services. The administrator filed a general denial and pleaded the statute of limitations. After a trial the claim was disallowed in the county court, and the plaintiff appealed to the circuit court, where the action was tried before a jury. The plaintiff, Martin, had been taken into Catherine Martin's family with a view of adopting him. In the circuit court, the jury returned a special verdict, and judgment was entered thereon in favor of the plaintiff, from which judgment the estate appealed.

G. M. Perry, for the appellant.

Castle & Castle and B. J. Castle, for the respondent.

²⁸⁸ WINSLOW, J. The bill of exceptions is not certified to contain all the evidence; hence we are relieved from the consideration of the question whether the verdict, or any part of it, is supported by the evidence, and the only important question in the case is whether the verdict and admitted facts sustain the judgment.

The facts may be briefly summarized as follows: A boy eight years of age is taken by a woman into her family under incomplete or defective adoption papers, coupled with an oral agreement with the boy's parent to leave him her property, consisting principally of real estate, in consideration of the boy's services. No legal adoption takes place, but the boy stays and does the ordinary work of a boy on a farm, and is treated as a son, until he is somewhere from eighteen to twenty-one years of age, when he leaves and never returns to render services. Afterward the woman dies intestate, leaving as her estate the real property before mentioned and a trifling amount of personal property. The claimant then files his bill for the reasonable value of his services, which ceased at least eleven years before the death of the woman. Can he recover?

Under well-settled rules of law adopted by this court, this question must be answered in the negative. Although not of kin to the intestate, the plaintiff was received into her family as a son, and the services rendered by him were rendered in that capacity; hence the presumption is that they were not to be paid for, and that presumption can only be ²⁸⁹ rebutted by proof, either direct or circumstantial, which establishes an express contract to pay for them: *Tylor v. Burrington*, 39 Wis. 376; *Wells v. Perkins*, 43 Wis. 160. The express contract which was shown was oral, and was in part a contract to devise real property, and hence within the statute of frauds (*Stats.* 1898, sec. 2304), and, being void as to the real estate, and indivisible, is void in whole: *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252; *Estate of Kessler*, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129, and cases cited. This contract, though absolutely void, still has the effect of rebutting the presumption that the services were to be gratuitous (*Estate of Kessler*, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129), and so opening the way to a recovery of the reasonable value of the services: *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257, and cases cited.

Manifestly, however, the void contract did not extend the time of payment for the services, and the plaintiff, if entitled to recover at all, could have made his demand and brought his

action in 1886, when his services had wholly ceased and he had attained his majority. The supposed contract would have been no defense to the action, because the statute in this state makes it void: *Thomas v. Sowards*, 25 Wis. 631. Not having brought his action, it was barred by the six year statute of limitation (Stats. 1898, sec. 4222) before the death of the intestate in 1897.

A claim is made that the statute of limitations was not properly pleaded, but, as this is a claim against an estate, it was not necessary to plead it. The statute forbids the allowance of a claim which is shown to be barred by the statute of limitations: Stats. 1898, sec. 3841.

We are aware that there are authorities in other states holding that an oral contract similar to the one before us is not void, but may be specifically enforced on the ground of partial performance: *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, and cases cited. It is enough to say, however, that this court has not adopted that rule.

We have discussed the case upon the basis that it is established ²⁹⁰ that the agreement to devise property to the plaintiff was an oral one, but we have not overlooked the fact that the verdict does not in specific language declare it to have been oral. The second question of the verdict asks the jury whether Catherine Martin at the time of the making of the adoption papers promised and agreed that she would give the plaintiff all her property, real and personal, at her death, and to this question the jury have given an affirmative answer. Now, it may be argued that this finding is a finding of a valid (i. e., a written) promise or agreement, and that in the absence of a complete bill of exceptions it must be conclusively presumed that there was evidence to support the finding; hence that it must be deemed a fact in the case that the agreement was in writing and valid. Whether this contention could avail the plaintiff anything in an action brought to recover the value of his services, in which he must repudiate the contract in order to recover, would seem to be a serious question; but, however that may be, we think that the only fair and reasonable construction of the finding is that the promise was oral. It will be noticed that the first question and answer find specifically that the parties executed certain supposed adoption papers, and that the second question omits all reference to the execution of any papers, but simply asks the jury whether Catherine Martin did "promise and agree" to give the plaintiff her property at the

time of the making of the adoption papers. The careful reference to the execution of papers in the first question, and the equally careful omission of all such reference in the second question, clearly indicate to any mind that the second question refers to an entirely different kind of an agreement or promise, and one not evidenced by the execution of any papers; and we cannot escape the conclusion that a jury would at once answer the second question in the affirmative if they were satisfied of the making of an oral promise.

291 When, moreover, the charge which was given to the jury in connection with the second question is considered, there can be no doubt, we think, that the affirmative answer to the question must be construed as simply the finding of an oral promise. This charge was as follows: "This question you will answer, also, from the consideration of all the evidence: Was it the understanding with the plaintiff's mother and the Martins that the latter should adopt the plaintiff and make him their heir? And did the plaintiff's mother consent to the proposed adoption on such conditions? This is a question of fact, and you will answer it in such a way as the evidence will warrant." Here the jury are plainly told that the question is whether there was an understanding between Mrs. Martin and the plaintiff's mother. If the jury paid heed to this instruction—and we must assume that they did—then their affirmative answer to the question is equivalent merely to a finding that there was an oral "understanding" between the parties. As matter of fact, all the evidence returned which bears on the subject shows that the agreement was by parol; but this is not, of course, conclusive, in the absence of a certificate showing that all the evidence is returned.

By the Court. Judgment reversed and action remanded, with directions to enter judgment dismissing the claim.

SERVICES—PROMISE OF COMPENSATION FOR, BY WILL—RECOVERY OUT OF ESTATE.—When services are rendered by one person to another in pursuance of a parol mutual understanding and agreement between them that compensation for them should be made by will, and the party receiving such services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased as a creditor for the value of such services: *Grant v. Grant*, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15. A parol agreement to devise and bequeath real and personal property as compensation for services rendered by a relative is within the statute of frauds, as to the real estate, and, the contract being indivisible, the whole agreement fails. But in such case the relative may recover for his services what they may be shown to have been reasonably worth, and such void agreement may be shown in evidence to rebut the presumption that they were rendered gratuitously: *Estate of Kessler*,

87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129. See, also, *Williams v. Hutchinson*, 8 N. Y. 312, 53 Am. Dec. 301, and note.

THE LAW OF ADOPTION by one person of the children of another is the subject of a monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 210-231.

WHEREATT v. WORTH.

[108 Wis. 291, 84 N. W. 441.]

STATUTE OF LIMITATIONS—DEMURRER.—Under a statute authorizing the defense of the statute of limitations to be interposed by demurrer, upon condition that it point out the statute relied upon, the demurrer is insufficient, unless the defendant specifies the particular section of the statute, or subdivision thereof, upon which he relies.

STATUTE OF LIMITATIONS—DISHONORABLE DEFENSE—INCONSISTENT IDEAS.—The idea that the defense of the statute of limitations is a vested right, entitled to constitutional protection, is not consistent with the notion that it is unconscionable and not to be favored by the courts, but a proper exercise of judicial discretion in refusing the defense will not be avoided.

STATUTE OF LIMITATIONS—AMENDMENTS SETTING UP.—A court has the same discretionary power to permit an amendment to a pleading, setting up the statute of limitations, as to permit any other defense to be pleaded; and it may, in the exercise of its discretionary power, and upon that ground alone, refuse to permit it in all cases where its availability depends upon judicial favor.

STATUTE OF LIMITATIONS—AMENDMENTS SETTING UP—REFUSAL OF. WHEN NOT ERROR.—A court does not err in refusing to permit a demurrer, interposing the defense of the statute of limitations, to be amended so as to cure an excusable mistake, by referring to the section of the statute relied upon, where the availability of the defense of the statute of limitations depends upon judicial favor.

Action to recover upon an appeal bond. The defendants demurred separately on the ground that the action was not commenced within the time limited by law, but did not specify the particular statute upon which they relied, other than as the six years' statute of limitations. Pending the plaintiff's motion to strike out the demurrers as frivolous, the defendants moved for leave to amend their demurrers by specifying the particular statute of limitations referred to therein. The defendants' motions were denied and plaintiff's motions granted. The defendants declined to answer upon certain terms imposed, and judgment went against them, whereupon they appealed.

J. F. Ellis and W. F. Bailey, for the appellants.

L. A. Doolittle and A. J. Sutherland, for the respondent.

²⁸⁸ MARSHALL, J. Appellants' counsel contend: 1. That the proper statute of limitations was sufficiently pleaded by the demurrers; 2. That the court erred in refusing to permit the demurrers to be amended by referring to the section of the statutes relied upon. Some other points are suggested in counsel's brief, but they are not considered of sufficient importance to warrant discussing them in this opinion.

1. The first contention cannot be sustained. The statutes governing the subject are very plain. Subdivision 7, section 2649, of the Statutes of 1898 says that a defendant may demur to the complaint upon the ground that "the action was not commenced within the time limited by law." Section 2651 says that a demurrer upon the ground that the action was not commenced within the time limited by law may be stricken out on motion unless it contain "a reference to the statute claimed to limit the right to sue." This court, in *Clarke v. Lincoln Co.*, ²⁸⁴ 54 Wis. 578, 12 N. W. 20, inferentially decided that a reference to the particular section or subdivision of a section applicable to the case, in a demurrer, is required in order to satisfy the calls of the statute; and the point was directly decided by this court in *Crowley v. Hicks*, 98 Wis. 566, 74 N. W. 348. The holdings are the same elsewhere under similar statutes: *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Stewart v. Budd*, 7 Mont. 573, 19 Pac. 221. The law authorizing the defense of the statute of limitations to be interposed by demurrer upon condition that the demurrer point out the statute relied upon, came in by the adoption of the revision of 1878. Since that time, it is believed, no case can be found where the sections referred to were not complied with, the sufficiency of the demurrer was challenged on that ground, and it was held good. Cases where a limitation statute was pleaded by answer are not in point. There is no statute requiring the plea of the statute of limitations by answer, strictly so called, to specify the particular statute relied upon.

2. Did the court err in refusing appellants leave to amend their demurrers? The contention in that regard is not free from difficulty. The situation of appellants is one of peculiar hardship, looking at it as involving a valuable right lost by excusable mistake; and we cannot view it in any other way, as an

original proposition. It seems that appellants should have been relieved from their error without hesitation, upon their complying with such terms as would have placed respondent in substantially the same position he was in before the demurrers were interposed, unless it was proper for the circuit court, in the exercise of judicial discretion, to refuse to grant the defendants the benefit of a valuable right which they never intended to surrender—in effect, to compel them to pay a large claim which the law had once extinguished. We apprehend that the learned trial court took that view of the matter when ²⁹⁵ the motions for leave to amend the demurrers were presented, and that, in the decision, he was governed by the idea, often found expressed in the decisions of this court, that the defense of the statute of limitations is unconscionable and not to be favored by the courts; that whenever the right to insist upon it is dependent upon the favor of the court, though that favor be required in order to avoid a purely excusable mistake, the court may properly compel the party to pay the penalty therefor of an entire forfeiture of his right. We cannot readily say that the trial court was not justified in that position and that the judgment can be disturbed, without ignoring the rule of stare decisis, which is grounded upon the idea that it is better to abide by a wrong rule firmly established than to seek to avoid or right it at the expense of those who have relied upon it. That doctrine has controlling force where the wrong rule of law has become a rule of property, unless the circumstances indicate an overpowering necessity to change it, which necessity cannot be satisfied by the exigencies of any particular case. When, however, the rule of stare decisis is invoked to secure adherence to a wrong doctrine which may be corrected without prejudice to anyone other than a party before the court, and others similarly situated as regards pending litigations, where no rule of property is required to be changed, courts are not so firmly bound by a previous ruling but that they may correct it with considerable freedom, if firmly convinced that it stands in need of correction.

The facts of this case seem to call upon the court very strongly for relief and to require a favorable answer to the application therefor, unless the law is so firmly established otherwise that it cannot be so abruptly disturbed as is necessary to accomplish that end, or unless the trial court had such reasonable ground to suppose that the law was so firmly established

that it cannot be said that the boundaries of judicial discretion were overstepped in reaching the result complained of.

²⁰⁶ Appellants, before interposing their demurrers, owed the respondent nothing. Respondent's cause of action was extinguished by his own laches. The right of appellants had, by force of the statute, superseded respondent's rights, and was secured to them by constitutional guaranties the same as any property right, as we shall see later. They never intended to part with that right. They failed for the moment to properly insist upon it because of misapprehension on the part of their attorneys of the scope of the statute as regards insisting upon it by demurrer. They were guilty of no fault from which they would not have been promptly relieved, as regards the defense of payment or any legitimate counterclaim or any ordinary defense, effective to defeat the plaintiff's claim. They acted with sufficient promptness in asking to be relieved from the error of their attorneys, and the ordinary terms imposed for granting leave to amend a pleading would have amply saved the respondent from prejudice by the delay, yet the favor was denied and a claim that in law did not exist when the action was brought to enforce it was thereby resurrected and fully re-established.

Viewing the situation as above indicated, it seems to call so strongly for a remedy as to justify the court in taking a retrospective view of our judicial policy as found in the books, in order to see just where we stand with reference to the defense of the statute of limitations. Is it, or, if it is, should it be considered, an unconscionable defense so that the court, upon a trifling pretext, can justly deny to a party the right to interpose it when that right depends at all upon judicial pleasure? It is considered that we are justified in using the term "trifling pretext" as an original proposition, and as applied to the case before us, since, as stated, it is plain that the appellants never intended to waive their statutory right in the first instance and that respondent would not have been prejudiced in any substantial degree if the court had allowed the application for relief from the mistake.

²⁰⁷ Anciently, there was no system of limitation statutes as we understand the term. The first attempt at such a system was made by the statute of 32 Henry VIII, chapter 2, which was superseded by the statute of 21 Jacobus I, chapter 16. From that the limitation statutes in most of the states of the Union, including our own, have been modeled. The books indicate that the innovation upon common-law methods was not

at first received favorably by the courts. It was held that it merely deprived the possessor of a right to the use of judicial machinery to enforce it, leaving the right itself otherwise unimpaired, with such a moral obligation upon the part of the person adversely interested to recognize it that it was dishonorable, in a sense, to insist upon the statutory defense thereto. That idea was transplanted to this country as part of the common law. In time, however, the legislative purpose to put forever at rest a claim against which a statute of limitations has completely run, in the absence of distinct acts intended on both sides to revive it, came to be recognized as controlling, and the duty of the courts to give effect thereto to be fully recognized. The effect was to largely or wholly do away with the idea that the defense of the statute of limitations is unconscionable and that courts should so exercise judicial functions as to prevent its operation and to lead to the contrary idea, that such statutes are highly beneficial, and that defenses under them constitute vested rights protected as such by constitutional guaranties and entitled to such protection the same as other property rights.

The radical change in judicial policy indicated is sufficiently shown by numerous expressions in legal opinions, of which the following are but a few of the many examples that might be given: "The court here disclaims all right or inclination to put on acts of limitation, which are among the most beneficial to be found in our books, any other construction than their words naturally import. It is as much ²⁹⁸ its duty to give effect to laws of this description, with which courts, however, sometimes take great liberties as to any other which the legislature may be disposed to pass": Livingston, J., in *Fisher v. Harnden*, 1 Paine, 55, 61, Fed. Cas. No. 4819. "I consider the statute of limitations a highly beneficial statute, and entitled as such to receive, if not a liberal, at least a reasonable, construction, in furtherance of its manifest object. It is a statute of repose. . . . The defense which it puts forth is an honorable defense. . . . There is wisdom and policy in it, as it quickens the diligence of creditors and guards innocent persons from being betrayed by their ignorance or their overconfidence in regard to transactions which have become dim by age. Yet I well remember the time when courts of law exercised what I can but deem a most unseemly anxiety to suppress the defense; and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor to construe them into ad-

mission of the debt. Happily, that period has passed away, and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation": Story, J., in *Spring v. Gray*, 5 Mason, 505, 523, Fed. Cas. No. 13,259. "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away": Marshall, C. J., in *Clementson v. Williams*, 8 Cranch, 72. "It has often been matter of regret in modern times that in the construction of the statute of limitations the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in any unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it, what it was intended to be, emphatically a statute of repose. . . . English decisions upon this subject have gone to great lengths. . . . There appears at present a disposition on the part of the ²⁰⁰ English courts to retrace their steps. . . . The American courts have evinced a like disposition": Story, J., in *Bell v. Morrison*, 1 Pet. 351, 360. To the same effect are *Wood v. Carpenter*, 101 U. S. 135, and *McCluny v. Silliman*, 3 Pet. 270. Statutes of limitation, "especially when relating to land, are entitled to and have generally received from this court a favorable regard and a liberal construction, with a view to the attainment of their objects": *Phillips v. Pope*, 10 B. Mon. 163. "The statute of limitations is a well-marked favorite": *Cooper v. Cooper*, 61 Miss. 676. To the same effect is *Hart's Appeal*, 32 Conn. 520. "Amendments to avoid the statute of limitations cannot be allowed. We are aware there are some cases the other way, based upon early decisions made when the statute of limitations was looked upon as a hard and unconscionable defense. But we can recognize no sound principle upon which such decisions can rest. Statutes of limitations are now quite generally looked upon as statutes of repose, and just as essential to the general welfare and the wholesome administration of justice as statutes upon any other subject, and to be construed with the same favor to effect the legislative intent": *People ex rel. Gorman v. Newaygo Circuit Judge*, 27 Mich. 138.

The foregoing fairly indicates the view generally taken of limitation statutes at the present date. There are decisions here and there that are not in harmony with the modern doctrine, but the weight of authority is so great in support of it that it has been generally written into the text-books as settled law. In 13 American and English Encyclopedia of Law,

first edition, 692, it is said that statutes of limitations are now almost universally regarded favorably as statutes of repose, and the decisions to the contrary are disapproved, citing a multitude of cases. To substantially the same effect are 1 Wood on Limitations, 7, and Angell on Limitations, 6th ed., 18.

Turning to the decisions of this court it will be found that the foundation idea which led to the early perversion of the ³⁰⁰ legislative purpose in devising a system of limitation statutes—that they were designed to act on the remedy only, taking that away but leaving the legal right otherwise unimpaired—was rejected at the commencement of our judicial history. In that respect more advanced ground was early taken here than that then or since occupied by many courts which have rejected the old notion that limitation statutes are to be strictly construed and defenses under them treated with disfavor. The idea that a defense under such a statute is unconscionable, and that courts may properly or ought to so discountenance as to defeat it wherever judicial favor is necessary to its availability, is grounded generally on the theory that the right is never extinguished by the statute. The idea that it extinguishes the right upon which it operates as effectually as payment, and creates a new right which cannot be taken away by legislative power or judicial action without the consent of its possessor—a right in the nature of property protected by constitutional guaranties—it would seem is not wholly consistent with the idea that the assertion of such right is dishonorable and should be treated that way by the courts.

In Sprecker v. Wakeley, 11 Wis. 432, it was held that if the bar of the statute is complete the legislature is powerless to give a remedy for the enforcement of the old right; that it is a mistake to suppose that a limitation statute affects the remedy merely; that it directly extinguishes the right by creating another in its place of just as high a character as regards constitutional protection. That doctrine has been steadily adhered to up to the present time, the most recent and significant recognition of it being in Eingartner v. Illinois etc. Co., 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433, where it was said that “a bar to a claim created by the operation of a statute of limitation is as effectual as payment or any other defense; that it creates a vested right of defense which of itself must be regarded as a species of property within constitutional ³⁰¹ guaranties, and that it completely supersedes, annuls, and extinguishes that upon which it operates.”

From what has been said it would seem that the doctrine that the defense of the statute of limitations is discreditable should not be maintained alongside of the doctrine that the bar of the statute extinguishes the right upon which it operates. The former seems to have found a place in the decisions of this court, at first in *Orton v. Noonan*, 25 Wis. 672. In *Plumer v. Clarke*, 59 Wis. 646, 18 N. W. 467, it was said, in substance, that the effect of the decisions of this court is that the defense of the statute of limitations by an individual is unconscionable, but that such a defense by a municipality is not so regarded. That is well entrenched in our jurisprudence and is wholly of judicial creation and confined within quite narrow limits. In later cases the defense under discussion was treated substantially the same as other defenses, though the court adhered to the doctrine that it is unconscionable.

In *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317, there was a failure to plead the statute in the first instance through ignorance of the defendant's attorney. The trial court held that a special plea of the statute was unnecessary. For that error the judgment was reversed on appeal to this court. Subsequently, the trial court relieved the defendant from the mistake of his attorney on payment of ten dollars costs and the costs of the action up to the time of applying for such relief. This court said that such action was a proper exercise of judicial discretion. In *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 80 Am. St. Rep. 54, 81 N. W. 1027, 82 N. W. 534, such an amendment was allowed on the trial to avoid the mistake of the defendant's attorney, no terms being imposed other than that the trial should not be delayed. That was held a proper exercise of judicial discretion, it appearing that the plaintiff was not prejudiced by the delay in pleading the statute. Following other decisions it was said, in effect, that the discretionary power of the court to relieve a party from excusable mistake in respect to pleading the statute of limitations ³⁰² is the same as in respect to any other mistake in making up the issues in a case for trial. In this connection, without referring to the cases in detail, it may be said that no case can be found in our books where the discretionary power of the trial court to allow the statute of limitations to be pleaded by amendment has been denied, or where the exercise of that power has been disturbed, except for clear abuse of judicial discretion, in that the favor was granted without the imposition of terms to prevent the opposite party from being prejudiced by the delay. In the very

recent case of *Sullivan v. Collins*, 107 Wis. 291, 83 N. W. 310, the trial court permitted such an amendment upon the trial without any excuse for the delay being given or any terms or conditions of granting the favor being imposed. That, on appeal, was held an abuse of discretion, reference being made to the doctrine as established, that the defense of the statute of limitations is not treated with the same favor as ordinary defenses and is classed as unconscionable. It was recognized, however, that the power of the court to allow such an amendment is as broad as to allow any other, subject to such exercise as to indicate some degree of judicial discretion.

In view of the foregoing, testing the decision appealed from by right in the abstract, we might well hold that it is clearly wrong. But we must go further, since there is reasonable ground to say that the judicial policy of this state is not clearly in harmony therewith. Notwithstanding the fact that the defense of the statute of limitations is here placed on the highest plane as regards its legal status, and the fact that in the course of our judicial administration a defense of the statute of limitations has been treated the same as others, the idea that there is an element of dishonor involved in the assertion of it, which stamps it as unconscionable, has not been removed from our system. It is preserved therein by the latest expression of the court on the subject, as above indicated.

²⁰⁸ It follows that we cannot say but that a trial court might reasonably consider, in deciding upon an application for judicial favor for relief from a mistake in failing to properly plead a vested right under a limitation statute, that the assertion of the right is in a sense dishonorable and upon that theory alone deny the application, regardless of the excusability of the mistake and of the ability of the applicant to save the opposite party harmless from injury because of delay in pleading the defense. Trial courts are expected to be guided by the decisions of this court, and where they reasonably submit to such guidance and considerately decide accordingly, their decisions should not be disturbed, even though the result be that the question involved, as an original proposition, is decided wrong. The rule of *stare decisis* must go that far, even where the judicial rule involved, though wrong, need not be sustained as a rule of property, the disturbance of which would be injurious to public interests. Such an adherence to judicial policy may cause a sacrifice of individual rights in a case now and then, but it is better that it should be that way than that the result of a fair

exercise of judicial discretion should be invaded. That does not militate at all against judicial freedom in appellate courts to correct their own errors in all proper cases.

The result is that we must hold that the trial court did not overstep the boundaries of judicial discretion in refusing appellants leave to amend their demurrers, while at the same time it is made sufficiently significant as not to be lost sight of hereafter that the logical result in the whole is to discountenance the seeming inconsistency between the doctrine that the bar of the statute of limitations extinguishes the right and creates another in the nature of property protected by constitutional guaranties, and the doctrine that the assertion of such new right is unconscionable. That makes harmony here, and, as regards the nature of the defense discussed, substantial harmony between the doctrine ³⁰⁴ here and the weight of authority elsewhere, and gives full effect to the legislative purpose.

By the Court. The judgment of the circuit court is affirmed.

STATUTE OF LIMITATIONS—DEMURRER—THE DEFENSE of the statute of limitations is an honorable one, and one to which all men are entitled as of right: *Anaconda Min. Co. v. Salle*, 16 Mont. 8, 50 Am. St. Rep. 472, 30 Pac. 909. The authorities are divided upon the question as to whether such defense can be raised by demurrer: See cases cited in the notes to *Zuellig v. Hemerlie*, 71 Am. St. Rep. 713; *Damon v. Leque*, 61 Am. St. Rep. 931.

STATUTE OF LIMITATIONS—VESTED RIGHT—FAVOR—The complete bar of the statute of limitations is a vested right, and entitled to protection as such: Note to *Lawrence v. Louisville*, 49 Am. St. Rep. 315. The right to plead the statute after it has run and become a bar is a vested right: *Lawrence v. Louisville*, 96 Ky. 505, 49 Am. St. Rep. 309, 29 S. W. 450. Such a bar not only takes away the remedy but the claim also, and the right to the defense of the statute, when fully vested, is subject to constitutional protection: *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433. That courts are not inclined to favor statutes of limitation except when used as instruments of justice, and not of strategy, see *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

AN AMENDMENT SETTING UP THE PLEA OF THE STATUTE OF LIMITATIONS in an answer will not be allowed, unless it would further the ends of justice: *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

ELLIS v. SOUTHWESTERN LAND COMPANY.

[108 Wis. 318, 84 N. W. 417.]

FRAUDULENT CONVEYANCES—SUIT TO SET ASIDE.—
A SURETY who has not paid the debt of his principal cannot maintain a suit to have the latter's fraudulent conveyance of property set aside and the property applied to the payment of the debt.

Action to have an alleged fraudulent conveyance set aside. The plaintiff, H. C. Ellis, executed an undertaking in which the defendant, J. F. Ellis, was a principal. Its condition was broken and a judgment was entered thereon. J. F. Ellis conveyed most of his available property to the defendant land company. No proceedings were taken to collect the judgment from J. F. Ellis, or to follow the property, and, without the judgment having been paid, the plaintiff brought this action, in which he alleged that such conveyance was in fraud of creditors and of his own rights, and in which he sought to have the property so conveyed subjected to the payment of the debt. A demurrer that the complaint failed to state facts sufficient to constitute a cause of action was sustained, and the plaintiff appealed.

W. F. Bailey, for the appellant.

Wickham & Farr and James Wickham, for the respondent.

314 BARDEEN, J. For many years the law has been settled in this state that a creditor is not entitled to maintain an action in equity to set aside a fraudulent conveyance until he has exhausted his remedy at law by obtaining a judgment against his debtor, issuing execution thereon, and having it returned unsatisfied: *Montague v. Horton*, 12 Wis. 599; *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045; *Weber v. Weber*, 90 Wis. 467, 63 N. W. 757; *French etc. Co. v. Theriault*, 107 Wis. 627, ante, p. 856, 83 N. W. 927. As between the parties and their representatives, a conveyance in fraud of creditors is valid and binding. One of the first requirements that must exist to enable a creditor to attack a fraudulent conveyance is that his demand should be legally enforceable: 14 Am. & Eng. Ency. of Law, 2d ed., 281. The plaintiff is a mere surety. He has paid no part of the judgment against him. He may never do so. It may be collected from the principal, or from some one of the other parties who signed the undertaking. At law he would have no standing

in court until he had paid the debt: *Taylor v. Coon*, 79 Wis. 76, 48 N. W. 123; *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100.

But it is said plaintiff may maintain this action upon the principle stated in the case of *Dobie v. Fidelity etc. Co.*, 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 482. That case holds that a surety may maintain an action in equity against his principal to compel him to exonerate him from liability by discharging the debt for which both are liable, without first paying it himself. But that is not this case. The surety here is attempting to go much farther. He is seeking to attack a conveyance which he could not attack, under the circumstances stated, even if he was a creditor. His rights as surety in such a case are no ³¹³ greater than those of creditors. A creditor could not proceed until he had exhausted his legal remedies. The conveyance being good as between the parties, it can only be attacked by creditors of the fraudulent grantor who have been defrauded, and then only under the circumstances already pointed out. The rule that a surety who has not paid the debt cannot bring a suit to have a fraudulent conveyance of property made by his principal set aside is laid down in the following cases: *Barnes v. Sammons*, 128 Ind. 596, 27 N. E. 747; *Williams v. Tipton*, 5 Humph. 66, 42 Am. Dec. 420; see *Mugge v. Ewing*, 54 Ill. 236; *Nash v. Burchard*, 87 Mich. 85, 49 N. W. 492. In Tennessee, under a statute passed since *Williams v. Tipton*, 5 Humph. 66, 42 Am. Dec. 420, was decided, a surety may now maintain such an action: *Greene v. Starnes*, 1 Heisk. 582.

The only case plaintiff's counsel was able to find which is claimed to support his position is a memorandum decision found in *Stump v. Rogers*, 1 Ohio, (*533) 242, the syllabus of which reads as follows: "Security may proceed against principal in equity to have his estate subjected to the payment of the debt without making payment himself before commencing his suit." The statement of the case shows that the action was brought by a surety to set aside an alleged fraudulent conveyance, but there is no discussion of the right in the opinion, and the decision, tested by the syllabus, is of little weight.

The true principle seems to be that a surety paying the debt of his principal is subrogated to the rights of his creditor. Until such payment he has no right enforceable against third parties. He may compel his principal to exonerate him from liability by applying his property to payment of the debt. But, when the principal has put his property beyond his power to

use it for that purpose, the surety must be content to follow it along the same lines that a creditor may follow it.

By the Court. The order appealed from is affirmed.

FRAUDULENT CONVEYANCES.—A SURETY cannot avoid a fraudulent conveyance made by his principal before the former incurs a loss: Note to *Choteau v. Jones*, 50 Am. Dec. 409; but see the note to *Greer v. Wright*, 52 Am. Dec. 117.

BOLIN v. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

[108 Wis. 333, 84 N. W. 446.]

NEGLIGENCE.—COMPARATIVE NEGLIGENCE is not a part of the law of Wisconsin.

NEGLIGENCE.—CONTRIBUTORY NEGLIGENCE AS A BAR.—Negligence, in the sense of a want of ordinary care, however slight, contributing to an injury, prevents a recovery therefor, where the act of the defendant was not willful or malicious, however great or gross may have been his negligence.

NEGLIGENCE.—WILLFUL, MALICIOUS, OR WANTON CONDUCT is properly beyond the scope of the term "negligence," as it is ordinarily understood, though the term "gross negligence" has sometimes been extended to include it, thus leading to some misunderstanding as to what the law really is. Such conduct has in it no element of inadvertence, which is a necessary element of negligence.

NEGLIGENCE.—INJURY TO NEGLIGENT TRESPASSER—RECOVERY.—The fact that a person was a trespasser at the instant of receiving a willful injury from the person upon whose property he was trespassing will not preclude him from recovering damages for such injury, though he was himself negligent.

RAILROADS—STOPPING TRAIN TO RID IT OF TRESPASSERS—NECESSITY OF.—It is not necessary, under all circumstances, for a railway company to stop its train before ridding it of the presence of willful trespassers.

RAILROADS—TRESPASSERS—POWER TO CAUSE UNLAWFUL CONDUCT TO CEASE.—A railway company may lawfully require a willful trespasser upon one of its moving trains to immediately cease his unlawful conduct by such means as not to indicate a willingness to deprive him of his self-control in leaving the train, if the speed of the train is not so great that a personal injury to him should be expected to occur, where due consideration is given to the duty of the trespasser to cease his lawlessness by all reasonable means in his power, and there is a reasonable expectation that he will use such means in attempting to do it.

RAILROADS—TRESPASSERS—WILLFUL INJURY TO—INDICATION OF.—It is not sufficient to indicate an intentional injury to a willful trespasser on a railway train that the party caus-

ing the injury had reasonable ground to expect that such a result was within reasonable probabilities. Otherwise a violation of the duty to exercise ordinary care would of itself be sufficient to indicate such injury. The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or, being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences, to warrant saying, reasonably, that the circumstances indicate willingness to perpetrate such injury.

RAILROADS—TRESPASSERS—INJURY TO, WHEN NOT WILLFUL.—If a willful trespasser riding on the bumpers of a freight train, moving at the rate of about four miles an hour, is commanded by a conductor to leave the train, and in doing so such trespasser falls under the wheels of a moving car and is crushed, so that he dies a few days afterward, it cannot be said that the conductor was guilty of willfully injuring the deceased, where he did not touch him or threaten violence to him, or do anything reasonably indicating that he was about to physically compel the deceased to cease the trespass and to accept imminent danger of receiving a personal injury in doing so; where he had reasonable ground to believe that persons of the trespasser's class were skilled in jumping on and off trains under the existing circumstances; and where he used no such means to enforce his command as would cause the trespasser to momentarily lose his judgment or self-control.

Action brought by Bolin, administrator, to recover damages for the death of Christ Peterson, alleged to have been caused by the wrongful conduct of the servants of the defendant in charge of one of its trains. The deceased had taken a place on the bumpers of the defendant's freight train for the purpose of "beating" his way. Other persons on the train were doing the same thing. While the conductor was seeking trespassers and ridding his train of them, he discovered the Peterson boy and commanded him in a sharp tone of voice and with some profane language, swinging his lantern between the cars at the same time, to jump off the train. He obeyed the command, and, going out on the grab irons, jumped for the platform, but when he struck the platform he slipped, or in some way lost control of himself, and fell under the wheels of a car, moving about four miles an hour, and was so badly injured that he died a few days afterward. It was proved that the class of men who "beat" their way on railroad trains customarily jump on and off trains when they are moving at a greater speed than four miles an hour. The jury rendered a special verdict, in which they found that the conductor ordered the deceased to leave the train, striking at him with a lantern; that the deceased jumped from the train because of a reasonable apprehension of immediate physical force being used to eject him; that the circumstances were such as to imperil his personal safety; that the act of the

conductor was the proximate cause of the injury; that he ought reasonably to have anticipated that his conduct would cause the injury; and that the boy was not guilty of any want of ordinary care which contributed directly to the accident. They also found, in answer to the eighth question, that "the conductor was guilty of reckless or wanton conduct in compelling the deceased to leave the car under the circumstances." Damages at five thousand dollars were assessed for the benefit of the estate. Upon the defendant's motion the verdict was amended by striking out the affirmative answer to the eighth question, substituting a negative answer therefor. The defendant then moved for judgment. The motion was granted and judgment was entered accordingly. The plaintiff appealed.

W. H. Frawley and W. F. Bailey, for the appellant.

H. H. Hayden, Pierce Butler, and Thomas Wilson, for the respondent.

³³⁹ MARSHALL, J. The reasons urged by counsel for appellant for a reversal of the judgment appealed from may properly be reduced to the following: Plaintiff's cause of action depended upon whether the defendant's conductor was guilty of gross negligence as found by the jury in answer to the eighth question. With that fact established, the right to recover was complete, regardless of whether plaintiff was or was not guilty of contributory negligence. Evidence was produced permitting of a reasonable inference in accordance with the answer to such eighth question, so that it was ³³⁹ error on the part of the trial court to treat such answer as erroneous and give judgment for defendant upon the ground that there was no evidence that brought the fact so found within reasonable probabilities.

The idea plainly contended for in the first proposition mentioned is that if a person be injured by the concurrence of two proximate causes, one want of ordinary care on the part of such person and one gross negligence on the part of another, legal damages result. To support that theory the learned counsel has drawn liberally from the adjudications of other courts, many of which have either followed fully or in part the doctrine of comparative negligence, which finds its most significant source in *Davies v. Mann*, 10 Mees. & W. 546, and has referred to adjudications of this court, which are made to appear consistent with such foreign adjudications. The doctrine referred

to, so far as it permits a recovery of damages as the result of a negligent act to turn on a comparison of the negligence of the plaintiff with the negligence of the defendant, however great the latter may be, within the boundaries of negligence strictly so called, and however slight the former may be if it only pass the boundaries of want of ordinary care, is not now, and never has been, a part of the law of this state, though it is true there are many expressions here and there in opinions in cases decided where the term "negligence" has been used as descriptive of wrongful conduct that was beyond the scope of the term "negligence" as it is ordinarily understood, which have led to some misunderstanding as to what the law really is. Some of such cases have, by the learned counsel for appellant, been brought significantly to our attention.

It seems necessary at this time to take a general view of the decisions of this court in respect to counsel's contention that gross negligence permits a recovery of damages resulting therefrom, notwithstanding contributory negligence of ³⁴⁰ the sufferer. By doing so we shall, we venture to say, make it clearly appear that any degree of negligence, strictly so called—wrongful conduct which springs from inadvertence to any extent, whether of an active or passive character—does not preclude the successful interposition of contributory negligence as a defense; while willful misconduct, so concurring, does have that effect, such willful wrong being what is sometimes referred to as willful, malicious, or wanton, evincing intention to do an injury to another—wrongful conduct which renders the guilty party properly liable to a claim for punitive damages and which does not fall within the scope of the term "negligence," though the term "gross negligence" has been so extended by this court and some others as to include it.

In *Stucke v. Milwaukee etc. R. R. Co.*, 9 Wis. 202, the earliest case in this court where the subject under discussion was treated to such an extent as to influence the subsequent judicial history of the state, the rule above indicated was not stated sufficiently strongly to fully satisfy what has been said, though the facts of the case fully warranted it. A locomotive engineer caused his engine to collide with a cow on the railway track and kill her under such circumstances as to clearly indicate an intention to produce that result. It was not an act of negligence, but a willful act, as that term is ordinarily used in the law, indicating intention. There was no reasonable ground to say that the engineer's act was characterized by any element of in-

advertence. The court, in discussing his conduct, called it gross negligence, but demonstrated what was meant thereby by quoting with approval Lord Denman, C. J., in *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29, 41 Eng. C. L. 422, to the effect that the boundary line between willful mischief and gross negligence is so hard to trace that it cannot be discovered with judicial certainty. "The law blends one into the other and considers that gross negligence indicates, to some extent, malice." That was ³⁴¹ followed in another paragraph by a general observation as to the law which did not accurately measure the facts of the case, nor come up to the standard of wrongful conduct that Lord Denman placed within the scope of the term "gross negligence" which is necessary to preclude the defense of contributory negligence. Such general observation, if it did not clearly enter the domain of comparative negligence, came dangerously near its boundaries. We refer to the following: "Where the facts show such degree of rashness or maliciousness on the part of the servants of the company as to evince a total want of care for the safety of the cattle, or willingness to destroy them [there is no trouble up to that point], though such destruction may not have been intentional [there is the difficulty, if the word "intentional" be understood in any other sense than premeditated design], we think it is no departure from justice or principle to hold the company responsible unless it appears that the plaintiff was equally negligent." However, that the court did not decide that negligence, strictly so called—even gross negligence, except as that term was extended to include wrongful acts not characterized by any degree of mere inadvertence—precludes the defense of contributory negligence, was demonstrated by many decisions thereafter rendered, in some of which the learned chief justice who wrote the opinion participated and pronounced the judgment of the court, and in none of which was it found necessary to even criticise the *Stucke* case.

In *Potter v. Chicago etc. Ry. Co.*, 21 Wis. 372, 94 Am. Dec. 548, an instruction given to the jury by the trial court, to the effect that if the plaintiff was guilty of slight want of ordinary care (the word "negligence" was used, but in subsequent cases corrected), contributing to his injury, he can nevertheless recover if the defendant was guilty of gross negligence which was also a contributing cause, was condemned, the court announcing the true rule of law to be that negligence (meaning ³⁴² want of ordinary care), however slight, contributing to the injury, prevents a recovery therefor. The language of

Judge Downer, in the Potter case was quoted with approval in *Cunningham v. Lyness*, 22 Wis. 245, with the remark that: "Substantially the same principle has been decided by the court in many cases that a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause." To that all previous cases on the subject were cited, commencing with the Stucke case.

In *Ward v. Milwaukee etc. Ry. Co.*, 29 Wis. 144, opinion written by Dixon, C. J., the Potter case was again referred to with approval, this language being used: "The law does not attempt to measure how little or how greatly the plaintiff may have fallen short of using ordinary care, but any failure in this respect, or slight want of such care contributing directly to the injury, will forbid a recovery."

Potter v. Chicago etc. Ry. Co., 21 Wis. 372, 94 Am. Dec. 548, was again referred to in *McCandless v. Chicago etc. Ry. Co.*, 45 Wis. 366, accompanied by language unmistakably indicating a judicial view that wrongful conduct exceeding mere negligence in any of its degrees as ordinarily understood—that is, as characterized by inadvertence—is essential to prevent the defense of contributory negligence being effective. The position of the court as thus maintained can be most quickly and definitely stated by quoting from the opinion written by Mr. Justice Taylor, as follows: "This court has held that slight negligence or slight want of ordinary care on the part of the plaintiff, which contributed directly to the injury complained of, would defeat an action even when the negligence of the defendant was gross: *Potter v. Chicago etc. Ry. Co.*, 21 Wis. 372, 94 Am. Dec. 548; *Cunningham v. Lyness*, 22 Wis. 245. . . . There was no evidence to go to the jury upon the question of whether the injury was produced by the willful or malicious act of the servants of the defendant, and we think that nothing short of that would have justified a verdict in favor of the plaintiff."

²⁴⁵ The doctrine firmly established by the foregoing was so emphasized in *Randall v. North Western Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419, that no room was left to misunderstand the purport of our judicial history up to that time or opportunity for departing therefrom in the future, consistent with a familiarity with such history, without evincing an intention to adopt, to some degree at least, the doctrine of comparative negligence. In discussing instructions given by the trial court which followed the lines of the most extreme notions of comparative negligence, Mr. Justice Taylor, speaking for the court

said: "Such a rule of weighing comparative negligence of the parties has never been adopted in this state. The rule in this state is that slight want of ordinary care which contributes to the injury will defeat the plaintiff's action, no matter how gross the negligence on the part of the defendant, unless such negligence be so gross that the court and jury may infer that the act of the defendant was malicious," citing all the cases heretofore referred to, commencing with *Potter v. Chicago etc. Ry. Co.*, 21 Wis. 372, 94 Am. Dec. 548. It is significant that some years later Mr. Justice Taylor in *Schilling v. Chicago etc. Ry. Co.*, 71 Wis. 255, 261, 37 N. W. 414, 40 N. W. 616, probably without intending to be inconsistent with the established doctrine of the court as by himself distinctly stated in the two opinions to which we have referred, dissented from the decision there rendered, upon the theory, as we read his opinion, of comparative negligence. He assumed that mere negligence of the defendant of a high degree—conduct short of such as imports an intention to injure—will preclude the successful interposition of the defense of contributory negligence. He referred to the conduct of the defendant as gross negligence sometimes, and as negligence at others, but there was no evidence in the case, as the court, we must assume, decided, indicating a willful injury even to the extent of a conscious disregard of whether the injury which in fact took place would be produced by his conduct.

³⁴⁴ In *Schoenfeld v. Milwaukee City Ry. Co.*, 74 Wis. 433, 43 N. W. 162, it is said that: "The law has grown to be elementary that any negligence of the plaintiff, however slight, that contributed to the injury complained of, precludes his recovery." That was followed by language for the first time, so far as we have discovered in any opinion of the court, giving color to the idea that gross negligence of the defendant, as the term is ordinarily understood—that is, having regard to the essential element of inadvertence, though of a high degree—is actionable regardless of his victim's contributory negligence. This is the language: "The learned counsel of the appellant contends that inasmuch as the defendant was guilty of gross negligence that caused the injury the principle does not obtain. But neither the facts in evidence nor the finding of the jury made the defendant guilty of gross negligence. It was mere negligence and not willful or gross that the jury found against the defendant. The authorities cited to this point are therefore inapplicable." When rightly understood it is clear that the

word "gross" as there used referred to the willful misconduct which was said in previous decisions to indicate intent. Mr. Justice Orton used the terms "willful" and "gross" in close connection, the latter being really used as explanatory of the former. Of that there can be no doubt, since *Potter v. Chicago etc. Ry. Co.*, 21 Wis. 372, 94 Am. Dec. 548, and the other cases to which we have referred were cited with approval, where it was distinctly stated that gross negligence, using the term as indicating inadvertence, does not permit a recovery for an injury caused proximately thereby in the face of contributory negligence of the injured person contributing thereto.

Valin v. Milwaukee etc. R. R. Co., 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084, is recognized as out of harmony with previous decisions of this court. It was there said that negligence less than gross will permit a recovery even though the injured party be guilty of contributory negligence. The term "negligence," by itself, was ³⁴⁵ evidently used as extending to the boundaries of inadvertence, and the term "gross," in connection with the term "negligence," as indicating wrongful conduct of a still higher degree. The departure which the opinion indicates from the law as previously declared was corrected in *Lockwood v. Belle City St. Ry. Co.*, 92 Wis. 97, 65 N. W. 866. Though it was there said, in effect, that contributory negligence of the plaintiff will not militate against his right to recover as against gross negligence of the defendant, it was plainly indicated that the latter term was used as descriptive of conduct evincing willfulness, as the word is used in the law, as synonymous with intent, either premeditated or its equivalent, as regards legal liability for damages. The present chief justice there said, in effect, that inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness, and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence. The purpose of the opinion was to correct *Valin v. Milwaukee etc. R. R. Co.*, 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084, and to pronounce the law as in *Potter v. Chicago etc. Ry. Co.*, 21 Wis. 372, 94 Am. Dec. 548, to which we have referred, such case being cited as the groundwork of the decision. The term "rashness, wantonness, and recklessness" was used as synonymous with "willful or malicious" in *Randall v. North Western Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419, and in *McCandless v. Chicago etc. Ry. Co.*, 45 Wis. 366; "willfully,

maliciously, or intentionally" in *Lynch v. North Pacific R. R. Co.*, 84 Wis. 348, 54 N. W. 610; "willful or gross" in *Schoenfeld v. Milwaukee City Ry. Co.*, 74 Wis. 433, 43 N. W. 162, and similar expressions. It is, perhaps, unfortunate that so many different expressions have been indulged in to express the idea of willful as regards the result caused—conduct indicating a sufficient degree of intent, at least, to be inconsistent with inadvertence, the distinguishing characteristic of negligence, strictly so called. The difficulty, if there be one, has grown out of extending the term ³⁴⁶ "negligence" in connection with the term "gross" so as to cover wrongful conduct distinct from negligence, strictly so called, by including in it an element of advertence instead of inadvertence. Willful, in legal parlance, means intentional, though not necessarily that express intent characterized by premeditated design.

That the language in *Lockwood v. Belle City St. Ry. Co.*, 92 Wis. 97, 65 N. W. 866, was intended as indicated is fairly demonstrated by the following, used by the same writer in *Lynch v. North Pacific R. R. Co.*, 84 Wis. 348, 54 N. W. 610, in part heretofore referred to: "There is no sufficient evidence in the record to sustain the finding that the engineer was guilty of gross negligence. In fact, the jury expressly exculpated him from willfully, maliciously, or intentionally injuring either of the horses." To the same effect is *Schug v. Chicago etc. Ry. Co.*, 102 Wis. 515, 78 N. W. 1090, where it was said that gross negligence that cannot be defended against by contributory negligence is that rashness or wantonness which evinces a total disregard for the safety of persons or property and is but little less than intentional wrong. Also, *White v. Chicago etc. Ry. Co.*, 102 Wis. 489, 496, 78 N. W. 585, where it was said that in all cases where the recovery is based on negligence the plaintiff's conduct must be free from contributory negligence, however slight, if the defendant's negligence is short of that which may be justly called willful: See, also, *Duame v. Chicago etc. Ry. Co.*, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 391; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185.

There are other cases that might be referred to bearing on the subject discussed, but it is believed there are none that would furnish additional light or vary the conclusion to which those we have mentioned unerringly point. There has been substantial harmony in the adjudications of this court from the first, leaving out *Valin v. Milwaukee etc. R. R. Co.*, 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084, and *Little v. Superior etc.*

Ry. Co., 88 Wis. 402, 60 N. W. 705. In the latter case there was a plain departure from the position of the court up to the time of the Valin case, on the doctrine³⁴⁷ of comparative negligence. That occurred by following such case. With the exceptions noted such doctrine has not found any place in our jurisprudence, though in some jurisdictions it has become firmly intrenched, and in one, after becoming so intrenched, the mischief of it was avoided by a legislative return to sound principles. The first departure here was corrected in Lockwood v. Belle City St. Ry. Co., 92 Wis. 97, 65 N. W. 866, as we have seen. The second departure was corrected in Johnson v. Superior etc. Ry. Co., 91 Wis. 233, 64 N. W. 755.

Want of ordinary care upon the part of an injured person, however slight, precludes recovering compensation for his injury from another who contributed thereto by his negligence, however great, but not if so contributed to by willful misconduct evincing intention to produce it, so far, at least, as to indicate conscious disregard of whether the injury occur or not, with knowledge that such a result will probably take place, which this court has brought under the head of the highest degree of negligence, calling it gross negligence. Circumstances making a claim for punitive damages against the immediate wrongdoer proper are really necessary in order to render contributory negligence of the injured party immaterial.

In the light of the foregoing, was contributory negligence material in this case? Counsel for both sides concede that such was not the situation unless the misconduct of the trainman was of that degree necessary to render the fact that the deceased was a willful trespasser immaterial—that is, unless his conduct was such as to evince an intention to injure the deceased, or such an utter disregard of the consequences of his act as to indicate that willingness to injure him which is equivalent, in respect to legal damages, to intent to produce the result. That is unquestionably the law as it has been stated by this court, and most recently in Schug v. Chicago etc. Ry. Co., 102 Wis. 515, 78 N. W. 1090. It is so laid down by standard text-writers, as for example: "If a railroad company³⁴⁸ willfully injure a trespasser it will be liable, even though he may be guilty of contributory negligence. In some jurisdictions the term 'gross negligence' is used": Elliott on Railroads, sec. 1254. "A railroad owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty except not to willfully injure them; and this applies to those who are at-

tempting to steal a ride or otherwise trespass upon the company's cars": Elliott on Railroads, sec. 1255. A trespasser on a railroad train may recover for a willful injury inflicted upon him by the trainmen in the performance of their master's duty: Shearman and Redfield on Negligence, 5th ed., sec. 64.

So it follows that whether the defense of contributory negligence and the finding of the jury in that regard were material as well as the right of plaintiff to recover independent of it, turns on whether we can say that the trial court erred in holding that, looking at the evidence in the most favorable light for the plaintiff that reason will permit, and giving to him the benefit of the most favorable inferences it will reasonably bear, it does not indicate that the defendant's conductor was guilty of willfully injuring the deceased. It seems that such question must be answered in the negative. There is no reasonable ground for saying that the conductor knew, or ought to have known, that a personal injury to the deceased would probably occur by his obeying the command to leave his position on the bumper of the car and cease his unlawful act of trespassing upon the defendant's property. The conductor supposed, and had a right to suppose, under the circumstances, that the deceased was a man of experience in jumping on and off trains when they were moving at a speed of more than four miles an hour; that he belonged to a class that were accustomed to such conduct and without putting themselves in any serious danger of receiving personal injuries. The evidence is all one way to that effect. The train was going at no greater speed than a man can walk. It was still at ³⁴⁰ the depot platform which the deceased left but a moment before he was injured to secure his place between the cars. He had the same means of safely leaving the train that he had in boarding it, save that it had in the meantime commenced to move slowly. Others of his class and with whom he had been associated were at that very time seeking to evade the vigilance of the trainmen and to board the train by seeking a position similar to that occupied by the deceased. He was not physically coerced. His ability, mental and physical, to care for himself was not reasonably impaired by anything which the conductor did. The circumstances were very unlike those in *Stone v. Chicago etc. Ry. Co.*, 88 Wis. 98, 59 N. W. 457. That did not turn on the mere fact that the train was in motion but the fact that it was going at a dangerous rate of speed, some eight miles an hour; and the further fact that the injured person was not a professional tree-

passer upon railway trains, but was one who appears to have boarded the train to ride as a passenger, supposing that he would be permitted to do so, and in that view took his place in the caboose. Nor is the case like *Carter v. Louisville etc. R. R. Co.*, 98 Ind. 552, 49 Am. Rep. 780, where a trespasser was pushed off the front end of a switch-engine while it was in rapid motion, and in such a way that he was unable to exercise judgment in making the movement, and was thereby caught under the wheels of the engine and seriously injured. Neither is it at all like *Kansas City etc. R. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, where the case turned on the dangerous rate of speed the train was moving, some eight miles an hour; that the injured person was a boy; and that he was compelled to jump from the ladder of a box-car in the face of apparent imminent danger of being thrown from his position. It is just as much unlike *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210, 45 Am. St. Rep. 307, 39 N. E. 708, where the injured person was a lad ten years of age, and was so terrified that he dropped from a car upon which he was riding while in momentary ³⁵⁰ loss of self-control. Such cases, and others upon which reliance is placed, are quite distinguishable, and have been distinguished in adjudications by other courts; from cases like this, two elements of distinction being referred to as of controlling significance—the speed of the train, and the inability of the injured party, by reason of the wrongful conduct of another, to use his judgment and control his movements: *Mugford v. Boston etc. R. R. Co.*, 173 Mass. 10, 52 N. E. 1078; *Planz v. Boston etc. R. R. Co.*, 157 Mass. 377, 32 N. E. 356. Those cases are in harmony with the cases upon which counsel for appellant mainly rely, so far as the latter do not enter the domain of comparative negligence. They hold, and rightly, in our judgment, that there is no actionable wrong, if wrong at all, in insisting upon a person who is a willful trespasser upon a railway train ceasing his unlawful conduct instantly, if the train be not going at such a rate of speed as to render that unreasonably dangerous under the circumstances, and the trespasser be not ill-used so as to cause him to momentarily lose his judgment or self-control. We perceive no difficulty in the rule of the Massachusetts cases when rightly understood. The Massachusetts court holds as strongly as any other that a trainman cannot, in the pursuit of his master's business, willfully injure a trespasser on his train without the master thereby becoming liable for the resulting damages, but that he may properly command such a

wrongdoer to end the trespass at any time, not accompanying such command by conduct indicating such imminent danger of its being so enforced as to produce involuntary compliance therewith. If the command be obeyed and an injury to the trespasser result, the previous command will not evidence a willful injury, even if the speed of the train be such that to physically compel the trespasser to cease his unlawful conduct would render a resulting injury willful and actionable. The doctrine seems sound, and it applies to this case so far as it fits the facts. The respondent's conductor ³⁵¹ commanded the deceased to leave the train. He did not touch the deceased nor threaten violence to him, nor do anything reasonably indicating that he was about to physically compel deceased to cease the trespass and to accept imminent danger of receiving a personal injury in doing so.

It must be admitted that *Johnson v. Chicago etc. Ry. Co.*, 94 Fed. 473, goes much further than the doctrine referred to. We do not deem it necessary to even discuss in this case the extreme views which United States District Judge Shiras there expressed. The doctrine that human life cannot willfully be seriously imperiled to prevent or end a mere trespass upon property must not be invaded by courts, even to remedy the menace and almost intolerable mischief caused by the conduct of those who habitually unlawfully contend with railroad trainmen to secure transportation upon their trains. But the inviolability of personal security against willful injuries can be adequately secured without going to such an unreasonable length as to hold that a railway company cannot rid its trains of the presence of willful trespassers without first stopping such trains. That would, in effect, deny such company the right to protect its trains at all against such lawlessness, as in that case such an army of men would be required to effect that result as to render the conduct of railway business impracticable.

Our statute (Stats. 1898, sec. 1818) requiring a train upon which a passenger is riding after having refused to pay his fare to be stopped at a railway station or near a dwelling-house before putting him off does not apply to such a case as this.

This opinion would need to be extended to a great length in order to review even a major part of the numerous cases cited by the learned counsel for appellant. While we cannot agree with his conclusions, we are much indebted to his industry and ability in reaching a right one.

A railway company may lawfully require a willful trespasser ⁸⁵³ upon one of its moving trains to immediately cease his unlawful conduct, by such means as not to indicate a willingness to deprive him of his self-control in leaving the train, the speed of such train not being so great that a personal injury to him should be expected to occur, giving due consideration to the duty of the trespasser to cease his lawlessness by all reasonable means in his power and reasonable expectation that he will use such means in attempting to do it. It is not sufficient to indicate an intentional injury that the party causing it had reasonable ground to expect that such a result was within reasonable probabilities, otherwise a violation of the duty to exercise ordinary care would of itself be sufficient to indicate such injury. The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or, being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences to warrant saying, reasonably, that the circumstances indicate willingness to perpetrate such injury: *Cleveland etc. Ry. Co. v. Miller*, 149 Ind. 490, 49 N. E. 445.

By the Court. The judgment of the circuit court is affirmed.

IN *TESCH v. MILWAUKEE ETC. LIGHT CO.*, 108 Wis. 593, 84 N. W. 823, Marshall, J., affirmed the rulings of the principal case that the doctrine of comparative negligence does not prevail at all in the supreme court of Wisconsin, and that the doctrine of that court, like that of all other courts which entirely discountenance comparative negligence, is that contributory negligence of the plaintiff, however slight, precludes his recovering in an action grounded on the defendant's negligence, however great such negligence may have been. "In this," said the learned justice, "we do not refer to willful misconduct of a wrongdoer, which has come to be spoken of as gross negligence, meaning, however, intent, actual or constructive, to do the injury and not negligence at all, strictly so called. The doctrine of contributory negligence applied here has the sanction of the common law from time immemorial, the support of most of the courts and standard text-writers, and half a century of the adjudications of this court. To change it, otherwise than by legislative enactment, would be judicial usurpation. Therefore, it is idle to urge upon our attention authorities that cannot be applied except by such transgression."

Tesch v. Milwaukee etc. Light Co., 108 Wis. 593, 84 N. W. 823, was an action to recover damages for an injury to a person who attempted to drive a buggy across the defendant's double-track electric street railroad in the city of Milwaukee, Wisconsin, but who was thrown out and injured by reason of a car striking the buggy. There was a judgment for the plaintiff and the company appealed, but in affirming the judgment, Marshall, J., rendering the opinion of the court, took occasion to say: "Counsel for respondent has with great industry and some misdirected professional energy brought to our attention a mass of cases in support of the judgment; but so many of them are out of harmony with the settled rules of law recognized here that an attempt to apply them to the facts of this case is confusing instead of helpful. There is little use in referring to adjudications to the effect that a diversion of attention will excuse a person, approaching a railway track with the intention of crossing the same, from performing the duty to look both ways and listen for coming cars, so as to carry the case to the jury on the question of whether the plaintiff, seeking to recover upon the ground of the defendant's negligence, was guilty of contributory negligence, because the rule here is, as it is in most courts, that such duty is governed by a rule of law and not to be determined as a fact from evidence by the jury. It is as useless to bring to the attention of this court cases where it has been held that, though the duty to look and listen exists, the testimony of the plaintiff that he performed that duty, yet did not see nor hear a coming car that was unquestionably within his sight and hearing, is sufficient to carry the case to the jury on the subject of his contributory negligence; because the rule here is that the duty to see those dangers that are in plain sight and hear those that are plainly within hearing by paying proper attention thereto is just as absolute as is the duty to look and listen for them, and that a jury cannot be permitted to say that a person called upon to perform that duty did not see or hear such dangers, and base a verdict thereon. It is just as useless to urge upon the attention of this court adjudications to the effect that if plaintiff was guilty of contributory negligence he may yet recover if the defendant, after observing his peril, could have avoided inflicting the injury complained of by the exercise of ordinary care; or cases to the effect that, notwithstanding plaintiff's contributory negligence, he may yet recover if the defendant was guilty of gross negligence, speaking of his conduct as characterized by negligence strictly so called, not intent, actual or constructive, to do the deed (see the principal case); or adjudications to the effect that if plaintiff's negligence preceded defendant's a considerable period of time, by the act of going upon the track, and defendant by the exercise of ordinary care could have avoided the occurrence of the accident, the negligence of the plaintiff must be considered remote and his situation at the time of the injury

a mere condition of it, and the negligence of the defendant the sole proximate cause thereof, notwithstanding plaintiff's negligence actually continued to and met that of the defendant at the instant of the accident. Such rules are found, in whole or in part, where the doctrine of comparative negligence, in whole or in part, prevails. But it does not prevail here at all."

In speaking of the right of ordinary travelers to cross a street-car track, it was shown that, where there are no restrictions or regulations as to the manner of operating cars, such travelers do not have the same right to go upon the track and compel the stopping of a car to enable them to pass over the track as the operator of the car has to delay their passage to enable the car to pass. "The test," said his honor, "of the ordinary traveler's right in crossing a street-car track, to harmonize reasonably with the spirit of an unrestricted franchise to maintain and operate as regards the rights of other users of the way, may properly be stated thus: A person desiring to cross a street-car track in advance of an approaching car has the right of way, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care: *New Jersey etc. Ry. Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else."

The justice then, for the purpose of showing that the plaintiff was not guilty of a want of ordinary care, applied these rules to the facts of the case, which, as embraced in the syllabus written by himself, were as follows: If a person, traveling with a horse and carriage, approaches a street crossing to pass over double street-car tracks located on the street running at right angles with that on which he is approaching, observes a car coming from the left on the track nearer him and one from the right on the other track, and stops for such cars to pass, the horse being located about ten feet from the nearest car rail, and the car from the left passes by and stops at the right-hand cross-walk and the one from the right passes over the street—the conditions being such that he can see the farther track at the right, looking by the front end of the stationary car, from a point about one hundred feet from the cross-

ing to a point about one hundred feet farther to the right, and can see such track in front of him to the left of the stationary car for about forty feet from the point of crossing, leaving about sixty feet of the farther track to the right out of view because of the stationary car—and a second car is approaching from the right on the farther track, a little way behind the first car coming from that direction, and at the instant the second car passes by he looks both ways for other approaching cars and sees one coming from the left, though not dangerously near, and none coming from the right, though at the instant of taking the observation one has just passed out of view within the sixty feet of track shut out from observation by the stationary car and is approaching at a speed of ten miles an hour, an unusual rate of speed for that situation and under the circumstances, without giving any signal of its approach, and he then starts to cross the track believing the way to be safe, he is not guilty of a want of ordinary care as a matter of law. The rule requiring one to take an observation of a railroad track before attempting to cross it, reasonably calculated to acquaint him of the presence of cars in dangerous proximity to the crossing, is not in conflict herewith.

"There was," said the learned justice, "no breach of duty to look both ways and listen. Was it, as a matter of law, want of ordinary care on the part of respondent not to have anticipated the probability of a car being obscured from his sight within the sixty feet of space he could not see by reason of the stationary car? It seems that the term 'probability' should be changed to 'possibility' in view of the verity in the case that the car was going at an unusual rate of speed, so that it came into and passed out of sight in a few seconds of time. That would be placing the standard of ordinary care which one must exercise as a matter of law higher, as it seems, than any established rule of law with which we are familiar will permit, or any precedent that has been cited to our attention or that we have been able to discover will justify. If the track had been obscured from the region of the crossing south for substantially all of the way within which an approaching car could otherwise have been seen and would have been, as a matter of law, dangerously near as regards plaintiff's crossing the track, the situation would be far different. It was to such a circumstance, among others, that the attention of the court was directed in *New Jersey etc. Ry. Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645. The same is true of *Langhoff v. Milwaukee etc. Ry. Co.*, 19 Wis. 480. There two trains were approaching on parallel tracks and substantially side by side, one of the trains being obscured from view by the other, and the track on which it was moving, except from the crossing to about the head of the observable train was all out of view; yet the court held that the plaintiff was not guilty of want of ordinary care in not anticipating the probability of there being a second train obscured from the injured person's point of observa-

tion by the one that was in sight. The situation was similar, on principle, in *Newark etc. Ry. Co. v. Block*, 55 N. J. L. 605, 27 Atl. 1067, *Oleson v. Lake Shore etc. Ry. Co.*, 143 Ind. 405, 42 N. E. 736, *Hovenden v. Pennsylvania R. R. Co.*, 180 Pa. St. 244, 38 Atl. 731, and other cases cited by appellant's counsel, and many others to be found in the books. They are analogous to *Johnson v. Superior etc. Ry. Co.*, 91 Wis. 233, 64 N. W. 753, where the railway track, except at the crossing and the immediate vicinity thereof, was obscured from view by the curtains of the driver's vehicle." "This decision," said he, "goes no further than that, under the circumstances of this case—the most significant being that a car had just passed by on the east track, that the entire track within which an approaching car would have been dangerously near was in view except a small space thereof over which a car going at the speed of the one in question would pass in four seconds, and that no signal of the presence of the car was given—it is susceptible at least of a reasonable inference that the attempt to cross the track on the theory that a car was not hidden from view in such short space, was not inconsistent with ordinary care. That raised this question of fact: What was the proper inference to be drawn? It was the province of the jury to solve that question." The judgment of the superior court was therefore affirmed.

THE DOCTRINE OF COMPARATIVE NEGLIGENCE does not prevail in Illinois: *West Chicago St. R. R. Co. v. Lilderman*, 187 Ill. 463, 79 Am. St. Rep. 226, 58 N. E. 367; and has never been recognized in Minnesota: *Fonda v. St. Paul etc. Ry. Co.*, 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166; or in Missouri: *Hurt v. St. Louis etc. Ry. Co.*, 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1.

NEGLECT—SLIGHT CONTRIBUTORY NEGLIGENCE of a person who is injured defeats his right to recovery, though the defendant or his agents were guilty of gross negligence, provided the injury would not have been suffered except for the negligence of the plaintiff: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939.

NEGLECT—WANTON AND WILLFUL CONDUCT.—CONTRIBUTORY NEGLIGENCE of the plaintiff does not preclude his recovery when the conduct of the defendant is wanton and willful, or where it indicates that negligence or indifference to the rights of others which must justly be characterized as recklessness: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939. A plea of contributory negligence is no answer to a complaint charging willful and wanton negligence: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 17, 11 South. 506. When the defendant's acts are willful and intentional, the negligence of the plaintiff, if any, is no longer deemed in law a proximate cause of the injury: *Fonda v. St. Paul etc. Ry. Co.*, 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166.

RAILROADS—TRESPASSERS—CHILDREN—LIABILITY FOR INJURY TO.—To enable a trespasser to recover for an injury,

he must do more than show negligence. He must show that the injury was wantonly or intentionally inflicted on him by the defendant: *Rodgers v. Lees*, 140 Pa. St. 475, 23 Am. St. Rep. 250, 21 Atl. 399. But a child of tender years may be a trespasser so as to bar recovery for his injury or death, even though he is so young that negligence cannot be imputed to him: *Rodgers v. Lees*, 140 Pa. St. 475, 23 Am. St. Rep. 250, 21 Atl. 399. A trespassing child may, however, recover where he is frightened off of a moving street-car by a conductor, in consequence of which he falls and is injured: *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210, 45 Am. St. Rep. 607, 39 N. E. 708; or where he is ordered by a brakeman to jump off while the train is moving rapidly, and he, fearing being thrown off, jumps and is injured: *Kansas City etc. R. R. Co. v. Kelly*, 86 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172. Compare the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 400-433, on negligence in dealing with children.

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1. ADOPTION—COUNTY COURT—JURISDICTION.—A county court has jurisdiction to hear proof in the matter of the adoption of a child, and to determine whether the parents have in fact abandoned it, although the petition for leave to adopt fails to state all the facts essential to authorize such adoption, and no notice has been given to the parents, but this does not authorize it to adjudge an adoption not in conformity with the statute. (*In re Estate of McCormick*, 890.)

2. ADOPTION—COUNTY COURT—EXCESS OF JURISDICTION.—Under a statute which expressly prohibits the adoption of a child on the ground of abandonment, without the fact of abandonment having been found by the county court, an order of adoption by that court without such a finding, is in excess of its jurisdiction, and a subsequent finding of that fact by the circuit court does not give life to such adoption. (*In re Estate of McCormick*, 890.)

3. ADOPTION—WAGES—SERVICES OF CHILD—PRESUMPTION.—If a boy, taken into a family under defective adoption papers, renders services as a son, the presumption is that such services are not to be paid for, and this presumption can only be rebutted by proof, either direct or circumstantial, which establishes an express contract to pay for them. (*Martin v. Martin*, 895.)

4. ADOPTION—DEFECTIVE PAPERS—SERVICES—PRESUMPTION—AGREEMENT REBUTTING.—If a boy, taken by a woman into her family under incomplete or defective adoption papers, renders services as a son, the presumption that such services are to be gratuitous is rebutted by proof of an express oral contract with the parent of the boy that the woman would, at her death, leave him all her property, real and personal, notwithstanding that such a contract is void as to realty, because it is within the statute of frauds, and, being indivisible, is void as a whole. (*Martin v. Martin*, 895.)

5. ADOPTION—DEFECTIVE PAPERS—ACTION FOR SERVICES—STATUTE OF LIMITATIONS.—If a boy, taken by a woman into her family under incomplete or defective adoption papers, renders services as a son, which cease upon his majority, he may at that time, if entitled to recover therefor at all, make demand and bring his action and it would be no defense that the woman had made a contract to leave him her property at her death,

If such contract is void, for a void contract could not extend the time of payment for the services. Hence, the six year statute of limitations then begins to run against such an action. (*Martin v. Martin*, 896.)

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1. AGENCY—NEGLECT OF AGENT—EVIDENCE.—If the negligence of an agent on a particular occasion is in issue in the case, evidence that he was negligent on other occasions is not admissible. (*Konold v. Rio Grande etc. Ry. Co.*, 698.)

2. AGENCY—AUTHORITY TO COLLECT NOTE.—THE POSSESSION of a promissory note by an agent is requisite to constitute apparent authority to collect such note. (*Kohl v. Beach*, 849.)

3. AGENCY—EMPLOYMENT OF SUBAGENTS.—While an agent may employ others to assist him in the purely ministerial and unimportant details of his employment, he cannot, as a general rule, employ subagents to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is at the very bottom of the employment. (*Kohl v. Beach*, 849.)

4. AGENCY—SUBAGENTS—AUTHORITY TO RECEIVE PAYMENT OF NOTE AND MORTGAGE.—Where one employs an agent to loan money for him, such agent to handle the money as his own, and the agent employs a subagent who negotiates a loan secured by a note and mortgage, such note and mortgage being delivered to the lender, the subagent has no authority, upon a default in payment of interest, to collect the entire debt and give an individual receipt therefor, where he has no express or general authority from the lender or his agent to collect such money, and the lender retains the note and mortgage in his possession. Hence, where, under such circumstances, a subagent collects a mortgage debt, neither the mortgagor nor his grantee can maintain an action against the lender to compel satisfaction of such mortgage, in the absence of any facts constituting an estoppel. (*Kohl v. Beach*, 849.)

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APPEAL.

1. APPELLATE PRACTICE—CONTINUANCE—DISCRETION. Motions for a continuance are addressed to the sound judicial discretion of the trial court, and the appellate court cannot interfere with the ruling made, unless the action of the court was plainly erroneous and an abuse of discretion. (*Kelly v. Lehigh Min. etc. Co.*, 783.)

2. APPELLATE PRACTICE—PREPONDERANCE OF EVIDENCE.—The findings and decree of the lower court cannot be disturbed on appeal unless they are against a plain preponderance of the evidence, and if the evidence is so conflicting that reasonable men might differ as to the conclusion to be reached, the decree cannot be disturbed. (*Camden v. Dewing*, 797.)

3. APPEAL—WHAT QUESTION CANNOT BE FIRST RAISED ON.—An objection that a bill in aid of execution was not filed in time cannot be raised for the first time on appeal. (*Cleland v. Clark*, 161.)

4. APPEAL—SUFFICIENCY OF EVIDENCE WILL NOT BE CONSIDERED, WHEN.—An assignment of error relating to the

sufficiency of evidence cannot be considered if the bill of exceptions embraces only a part of the testimony, although the trial judge's certificate states that all of it has been returned. (*People v. Slayton*, 211.)

5. APPELLATE PRACTICE—FILING OF DEMURRER.—If the court journal shows that a demurrer was argued, submitted to, and decided by the trial court, and bears the file marks of the clerk, it must be held on appeal to have been filed, although the clerk has failed to enter such filing on the printed record. (*Myers v. Jenkins*, 613.)

6. APPELLATE PRACTICE—ERRORS IMMATERIAL.—In an action against the owner of a wagon and team and a street railway company, where a newsboy on a moving car was carried against the horses or wagon tongue and knocked off the car and injured, but there was no evidence of negligence on the part of the company, a judgment for the latter will be affirmed, notwithstanding errors occurring at the trial, where the action has abated as to such owner by reason of his death. (*Padgett v. Moll*, 347.)

7. TRIAL—INSTRUCTIONS.—A failure to charge a proposition of law applicable to the case cannot be taken advantage of by assigning error on a charge that is abstractly correct. (*Keys v. State*, 63.)

8. APPELLATE PRACTICE—ERRONEOUS INSTRUCTIONS are not cause for the reversal of the judgment, when the verdict is right. (*Miller v. Palmer*, 107.)

9. CRIMINAL LAW—APPELLATE PRACTICE.—The denial of a motion for a new trial on the ground that the verdict is contrary to the evidence and the law, without specification of error or bill of exceptions thereto, cannot be reviewed on appeal. (*State v. Washington*, 141.)

10. CRIMINAL LAW.—RULING DENYING CHANGE OF VENUE, unless brought up by bill of exceptions, cannot be reviewed on appeal. (*State v. Johnson*, 139.)

APPURTENANCES.

See Deeds, 9; Waters and Watercourses, 11-18.

ARCHITECTS.

ARCHITECTS—CONTRACTS—NEW PLANS.—Where an architect, who has made complete plans and specifications for a building to be erected on another's property, which plans are accepted, subsequently accepts orders for a second set of plans, nothing being said about compensation therefor, such acceptance constitutes a new contract having no relation to the work under the first contract, and for the performance of which the architect may recover compensation. (*Fitzgerald v. Walsh*, 824.)

See Mechanics' Liens, 3.

ARREST OF JUDGMENT.

See Judgments, 10.

ARTIFICIAL LAKES.

See Waters and Watercourses, 21-23.

ASSIGNMENTS.

1. **ASSIGNMENT—MONEY TO BECOME DUE.**—An order to pay to a person therein named the whole of a particular fund yet to become due upon the performance of an existing contract operates, not only as between the drawer and payee, but also as to the drawee, as an equitable assignment of the fund to the payee. (*Walton v. Horkan*, 77.)

2. **ASSIGNMENT—MONEY TO BECOME DUE—GARNISHMENT.**—If an equitable assignment of the whole of a particular fund to become due upon the performance of an existing contract is made before the service of garnishment upon the holder of such fund, the garnishing creditor must be postponed to the assignee, whether the garnishee has notice of the assignment or not. (*Walton v. Horkan*, 77.)

See Mortgages, 1, 2.

ASSIGNMENT FOR CREDITORS.

1. **ASSIGNEE FOR CREDITORS—SALES OF, WHETHER FREE FROM LIENS.**—If an insolvent makes a general assignment of his property for the benefit of his creditors, including therein two parcels of land upon each of which a vendor's lien exists, and they are advertised and sold by the assignee without mentioning such liens in the notice of sale, for an adequate price, the rule of caveat emptor does not apply to the purchaser, and he has a right to discharge such lien out of the purchase price paid by him. (*Linn v. Collins*, 788.)

2. **ASSIGNMENT FOR BENEFIT OF CREDITORS.**—A VOLUNTARY COMMON-LAW ASSIGNMENT for the benefit of creditors, good in the state where made, carries title to personal property wherever situated. (*Segnitz v. Garden City etc. Trust Co.*, 830.)

3. **ASSIGNMENT FOR BENEFIT OF CREDITORS—BANKRUPT LAW—CONFLICT OF LAWS.**—A statute relating to assignments, which enables the assignor to obtain a discharge from his debts and provides that every creditor, within or without the state, who should accept a dividend out of the assigned estate, or participate in any way in the proceedings, should be bound by the order of discharge, subject to the right of appeal, partakes of the character of a bankrupt law; and such an assignment is ineffectual to transfer title to property of the insolvent situated in other states, at least as against creditors in those states. (*Segnitz v. Garden City etc. Trust Co.*, 830.)

4. **ASSIGNMENT FOR BENEFIT OF CREDITORS—FOREIGN—RIGHTS OF CREDITORS—CONFLICT OF LAWS.**—Where a corporation organized in one state but having its principal place of business in another state, makes an assignment in the latter state under a statute which enables it to obtain a discharge from its debts, such assignment does not transfer title to property situated in the former state, and a creditor located there is not estopped from acquiring title to the insolvent debtor's property in that state by the fact that he subsequently filed a claim for the balance due him in the assignment proceedings, because the filing of such claim is merely a recognition of the validity of the assignment so far as it conveys property in the state of the assignment. (*Segnitz v. Garden City etc. Trust Co.*, 830.)

5. **ASSIGNMENT FOR BENEFIT OF CREDITORS—MEANING OF "PERSON."**—In a statute providing that "any person" may

make a voluntary assignment for the benefit of creditors, the word "person" should be construed to include corporations, where other state statutes provide that in the construction of statutes the word "person" may extend and be applied to bodies politic and corporate as well as to individuals. (*Segnitz v. Garden City etc. Trust Co.*, 830.)

ASSOCIATED PRESS.

See Corporations, 5; Monopolies, 2; Police Power, 3.

ASSOCIATIONS.

1. **BENEFICIAL ASSOCIATIONS—SICK BENEFITS—FROM WHOM DUE.**—The members of a beneficial order are not individually liable to another member for sick benefits unless by some express law of such order. The obligation to pay sick benefits rests upon the lodge of the order alone. (*Myers v. Jenkins*, 613.)

2. **BENEFICIAL ASSOCIATIONS—METHOD OF RECOVERING BENEFITS.**—A member of a beneficial order claiming to be entitled to sick benefits must first seek his remedy in the tribunals of the order, and the determination therein in substantial compliance with its laws is final and conclusive of the right to such benefits; but if the order refuses or neglects, upon proper demand, to thus determine the right to benefits, or refuses to pay them after they have been awarded to the member, he is then entitled to sue in the civil courts for their recovery. (*Myers v. Jenkins*, 613.)

3. **BENEFICIAL ASSOCIATIONS—CONTRACTS OUSTING COURTS OF JURISDICTION.**—A member of a beneficial association cannot bind himself by contract, in advance, to abide by the decisions of the tribunals of the organization and renounce his right to appeal to the civil courts for the redress of wrongs committed by such tribunals. Such contract is void. (*Myers v. Jenkins*, 613.)

4. **BENEFICIAL ASSOCIATIONS—LOSS OF RIGHT TO SUE FOR BENEFITS.**—If it is determined by a tribunal of a beneficial order, in substantial compliance with its laws, that a member is not entitled to sick benefits, and he appeals to a higher tribunal of the order and is furnished with a proper transcript of the proceedings, but thereafter fails to secure a hearing of his appeal by reason of his own negligence, his failure to secure such hearing does not entitle him to sue for benefits in the civil courts. (*Myers v. Jenkins*, 613.)

ATTACHMENT AND GARNISHMENT.

1. **ATTACHMENT—FRAUDULENT TRANSFERS.**—A father may contract with his minor son to pay the latter wages for his services, and if he delivers personal property to such son in payment of his wages, the fact that the property is found in the possession of the father at a subsequent time does not render it subject to attachment as his property, since, in such case, the possession of the father is that of the son. (*Hargrove v. Turner*, 24.)

2. **EXEMPTION—LABORER.—STREET RAILWAY CONDUCTORS** whose duties are of a character depending more upon a mere physical power to perform manual labor than upon the possession of mental skill or business capacity, involving the exercise of intellectual faculties, are "laborers," whose wages as such are exempt from garnishment. (*Stuart v. Poole*, 81.)

3. **GARNISHMENT—ABUSE OF PROCESS—EXEMPTIONS.** A creditor cannot, by garnishment proceedings, tie up in the hands

of an employer separate amounts of money earned as wages by a laborer until the time exempting such wages has expired, and then by another garnishment proceeding appropriate these several amounts to the payment of his debt. Such proceedings are an abuse and perversion of civil process. (*Rustad v. Bishop*, 282.)

4. EXEMPTION STATUTES ARE DESIGNED to secure to laborers and their families the small fruits of their toil, and must be given such proper and liberal interpretation as will give them full force and effect. (*Rustad v. Bishop*, 282.)

5. GARNISHMENT—SITUS OF DEBT—NONRESIDENT PARTIES.—If all the parties to an action brought in the state—the plaintiff, the defendant, and the garnishee—are nonresidents, none of them being in the state except the garnishee who is served with summons while he is within the state temporarily upon business, the garnishment process must be discharged whenever the facts are brought to the attention of the court. (*McKinney v. Mills*, 278.)

6. GARNISHMENT—JURISDICTION.—A person served with garnishment process has a right to raise all questions as to the jurisdiction of the court to proceed against him. (*McKinney v. Mills*, 278.)

See Assignments, 2; Shipping; Wagers, 4.

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—COMPENSATION OF STENOGRAPHER OR COURT REPORTER.—An attorney in general charge of a case may bind his client to pay for copies of evidence furnished by a stenographer or court reporter at the request of the attorney, for use in the trial of the case. (*Miller v. Palmer*, 107.)

2. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—In an action by a stenographer to recover for copies of evidence furnished by him and used in the trial of a case, evidence by an attorney, who was acting as clerk for the litigant's attorney in arranging the evidence, that such litigant was present when the copies of the evidence were furnished and used is not a privileged communication. (*Miller v. Palmer*, 107.)

See Court Reporters, 2; Trial, 2, 3.

BANKRUPTCY.

See Assignment for Creditors, 3.

BANKS AND BANKING.

See Trusts, 1.

BETTERMENTS.

1. REAL PROPERTY.—AN ALLOWANCE FOR BETTERMENTS SHOULD BE BASED on the increased value of the premises, and not on the cost of the improvements. (*Cleland v. Clark*, 161.)

2. REAL PROPERTY—ALLOWANCE FOR BETTERMENTS—WHEN PROPER.—An occupant's honest belief in his right or title to land is "good faith" within the meaning of the betterment law. Hence, a purchaser of land who believes that he is getting a good title, who enters thereon under a quitclaim deed, and who improves the land without notice of a judgment against his vendor,

has color of title in good faith, and a lien upon the land for his improvements, which is paramount to that of the judgment creditor, who has levied execution. (*Cleland v. Clark*, 161.)

3. **EQUITY—DECREE FOR BETTERMENTS—WHEN PROPER.**—If a complainant files a bill in aid of execution to reach land in the possession of one who bought and improved it without knowledge of the complainant's judgment, the decree should make an allowance for betterments in favor of the occupant. (*Cleland v. Clark*, 161.)

See Improvements; Partition, 4-6.

BREACH OF PROMISE.

See Marriage and Divorce, 1-10.

BUILDING AND LOAN ASSOCIATIONS.

CONTRACTS—UNCONSCIONABLE.—A contract between a building and loan association and a borrower which requires the latter, on a loan of \$1,500, to pay \$18 monthly as premium on thirty shares of stock in the association, nominally subscribed for by the borrower until \$100 per share on such stock is paid, and to pay on such loan interest at the rate of six per cent per annum, payable monthly, until such stock is fully paid up to its par value of \$100 per share, and that upon such full payment such shares of stock shall be surrendered and the obligation become void, otherwise to remain in full force, is unconscionable, and the transaction should be treated as a simple loan, repayable with interest. (*Howells v. Pacific States Sav. etc. Co.*, 659.)

CARRIERS.

1. **CARRIERS—TERMINATION OF LIABILITY.**—If a common carrier receives goods to be carried by it to a certain port and from there on to another place by steamship, and issues its bill of lading containing a condition that "this contract is executed and accomplished, and all liability thereunder terminates on the delivery of such property to the steamship, or to the steamship company, or on the steamship pier at such port," and after carrying the goods to such port it places it on its own pier under its own exclusive control and custody, without delivery or an offer to deliver, to the steamship company, its liability as a common carrier is not terminated. (*Lewis v. Chesapeake etc. Ry. Co.*, 816.)

2. **CARRIERS—TERMINATION OF LIABILITY.**—If goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier, and such intermediate carrier does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse or on his premises, without delivery or notice to, or any attempt to deliver to, the next carrier. (*Lewis v. Chesapeake etc. Ry. Co.*, 816.)

See Railroads.

CATTLE.

See Trespass.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES—PROPERTY NOT IN EXISTENCE.—An agreement may be made to create a lien upon property not yet acquired, or not yet in existence, and the lien attaches from the time when the party agreeing to give it acquires an interest in the property to the extent of such interest. (*Bidgood v. Monarch Elevator Co.*, 604.)

2. CHATTEL MORTGAGES—CROP TO BE GROWN—INTEREST NEVER ATTACHING TO SPECIFIC GRAIN.—A chattel mortgage, executed by a tenant upon a portion of a crop which is to be raised by him under a contract, whereby the title and right of possession of the crop remained in the landlord until the crop was divided, never attaches to the tenant's interest in such crop, where the specific grain raised was never divided, but was delivered to the defendant for general storage, and subsequently the landlord and tenant agreed upon their respective shares, and general storage checks were issued to them for the number of bushels to which each was entitled, since the tenant acquired no interest in the specific grain raised to which the mortgage lien could attach. (*Bidgood v. Monarch Elevator Co.*, 604.)

3. CHATTEL MORTGAGES—NOMINAL MORTGAGEE—NON-DELIVERY—PASSING OF TITLE.—If a person executes a note and a chattel mortgage to secure it, making them payable to a person to whom he owes nothing, indorsing the name of the payee thereon, and sends them to a third person, with the request that the latter indorse and sell them and send him the proceeds, there is no title to the note and mortgage in the payee named, for want of a debt and want of delivery, and it is not necessary for such nominal mortgagee to assign the note and mortgage in order to pass the title. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

4. CHATTEL MORTGAGES—DESCRIPTION.—If the description of property mortgaged is "one hundred and twenty head of feeding cattle now on feed in Audrain county, Missouri," and the evidence shows that the cattle in suit, at the time of its commencement, belonged to the mortgagor, and were, at the date of the mortgage, in the county named, such description is sufficient unless the mortgagor can show that at the time he had another lot of cattle of the same description in the same county, and that was the lot covered by the mortgage. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

5. CHATTEL MORTGAGES—RIGHT TO DECLARE FORFEITURE.—A chattel mortgagee cannot arbitrarily create a forfeiture of the mortgage upon the ground that he deems himself insecure, as authorized by the mortgage, without just cause therefor based upon the existence of facts constituting reasonable ground of belief, which is a question for the determination of a jury. (*Nash v. Larson*, 272.)

6. CHATTEL MORTGAGES—WAIVER OF LIEN.—Where one holding a chattel mortgage authorizes the mortgagor to sell the property at private sale, and a sale is subsequently made, such facts operate as an implied waiver of the lien of the mortgage, whereby the mortgage is defeated and it is immaterial that one claiming to hold a prior mortgage also requested that the sale be made and that the proceeds were in fact paid to such prior mortgagee. (*Peterson v. St. Anthony etc. Co.*, 528.)

See Replevin, 2.

CHECK.

See Limitation of Actions, 6, 7.

CITIZENSHIP.

See Naturalization.

COAL WEIGHING.

See Constitutional Law, 16.

COMMERCE.

See Interstate Commerce.

COMMISSIONS.

See Usury, 4, 5.

CONDITIONS.

See Wills, 3-5.

CONFLICT OF LAWS.

See Assignment for Creditors, 3, 4; Executor and Administrator, 12, 13; Husband and Wife, 2; Jurisdiction.

CONGRESS.

See Evidence, 3.

CONSTABLES.

1. CONSTABLES—CARE OF PROPERTY—COMPENSATION.

A constable is entitled to be reimbursed for necessary and reasonable expenditures made by him in good faith in taking care of and preserving property seized under valid process. (*State v. Hitchens*, 90.)

2. CONSTABLES—SALES—EXPENSES.—The duty of selling goods levied upon by a constable devolves upon himself alone, for which he is allowed a commission, but he cannot charge the parties for and collect the additional cost either of an auctioneer or a clerk employed by him to assist in the sale. (*State v. Hitchens*, 90.)

3. CONSTABLES—COMPENSATION—FAILURE TO ITEMIZE COSTS.—The failure of a constable to itemize in his return of a writ the services for which he has charged does not defeat his right to fees, to which, under the evidence, he is clearly entitled. (*State v. Hitchens*, 90.)

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—TITLE OF STATUTES.—The "object" of a law is the aim or purpose of the enactment, while its "subject" is the matter to which it relates and with which it deals. (*State v. Ferguson*, 123.)

2. CONSTITUTIONAL LAW—TITLE OF STATUTES.—If the title of an act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says that it shall embrace but one, the whole act is void, from the manifest

impossibility in the court choosing between the two, and holding the act void as to one and valid as to the other. (*State v. Ferguson*, 123.)

3. **STATUTES—RETROACTIVE EFFECT.**—Generally speaking, statutes act prospectively only, and are not given retrospective effect, unless such was the clear legislative purpose. (*Osborne v. Lindstrom*, 516.)

4. **CONSTITUTIONAL LAW—RETROACTIVE LEGISLATION.** A statute is not to be construed so as to give it a retroactive operation, unless there is something on its face putting it beyond a doubt that such was the purpose of the legislature. (*Merchants' Bank v. Ballou*, 715.)

5. **CONSTITUTIONAL LAW—RETROACTIVE LEGISLATION—VESTED RIGHTS—JUDGMENTS.**—Vested rights in property cannot be disturbed by retroactive legislation, and a judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value, alter its amount nor diminish or destroy its effect as a lien on land. (*Merchants' Bank v. Ballou*, 715.)

6. **CONSTITUTIONAL LAW—VESTED RIGHTS—ALTERATION OF REMEDY.**—Although the legislature may modify or change the form of the remedy, provided no substantial right secured by contract is thereby impaired, yet any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is unconstitutional and void. (*Merchants' Bank v. Ballou*, 715.)

7. **CONSTITUTIONAL LAW—JUDGMENT LIENS—VESTED RIGHTS.**—A judgment lien is a mere remedy for enforcing the judgment. The statute which gives that remedy forms a part of the contract for the lien. Any law which takes away such remedy impairs the obligation of the contract and is unconstitutional and void. (*Merchants' Bank v. Ballou*, 715.)

8. **CONSTITUTIONAL LAW—PLEADING.**—It is not necessary to specially plead the unconstitutionality of a statute or municipal ordinance. The question may be raised by demurrer in the trial court, and the error assigned for the first time in the appellate court. (*Adkins v. Richmond*, 705.)

9. **CONSTITUTIONAL LAW—JURISDICTION** of the appellate court must affirmatively appear from the record, but it does so appear when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the national or state constitution. Any proceeding which necessarily puts their validity in issue, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to give the appellate court jurisdiction. (*Adkins v. Richmond*, 705.)

10. **CONSTITUTIONAL LAW—TRAMPS.**—A statute providing that any tramp who threatens to do injury to the person or property of another shall be imprisoned in the state penitentiary is not unconstitutional, as being arbitrary class legislation, nor as depriving persons of liberty without due process of law, nor as denying to them the equal protection of the law, nor as depriving them of the right to seek and obtain happiness and safety. (*State v. Hogan*, 628.)

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13. CONSTITUTIONAL LAW—TRAMPS.—A law providing that a tramp found carrying a firearm or other dangerous weapon shall be imprisoned in the penitentiary is not unconstitutional, as a denial of the right to bear arms. (*State v. Hogan*, 626.)

14. CONSTITUTIONAL LAW—LABEL GIVING INGREDIENTS OF COMPOUND.—A statute requiring all manufacturers and sellers of baking-powder to affix a label to every box or can containing the name and residence of the manufacturer, and the words "this baking-powder is composed of the following ingredients, and none other," naming them, is a valid exercise of the police power of the state, and not unconstitutional as an infringement upon private rights, nor as class legislation. (*State v. Sherod*, 268.)

15. CONSTITUTIONAL LAW—RURAL HIGHWAY—LOCAL IMPROVEMENT—TAXATION.—A rural highway is not a "local improvement" within the meaning of a constitutional provision exempting from equality of taxation provision assessments for local improvements by municipal corporations. Hence, a statute providing that owners of land within one mile of a rural highway laid out thereunder shall pay the cost and expense thereof is unconstitutional and void. Such highway must be laid out, established, and improved at the expense of the public at large. (*Sperry v. Flygare*, 261.)

16. CONSTITUTIONAL LAW—WEIGHING OF COAL BEFORE SCREENING—RIGHT TO CONTRACT.—A statute making it unlawful for any mine owner, lessee, or operator of coal mines, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employé sending the same to the surface and accounted for at the legal rate of weights fixed by law," has no other object than to prevent the making of contracts between operators and miners whereby the former shall become bound to make, and the latter entitled to receive, just compensation according to the care and skill of the miner, and is unconstitutional as an unwarrantable invasion of the right to contract. (*In re Preston*, 642.)

See Interstate Commerce; Police Power.

CONTINUANCE.

See Appeal, 1; Trial, 8.

CONTRACTS.

1. CONTRACTS.—IF ONE OF TWO CONSIDERATIONS for a contract is void, merely for insufficiency and not for illegality, the other, if sufficient, will support the contract. (*King v. King*, 635.)

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1. CONTRACTS.—IF ONE OF TWO CONSIDERATIONS for a contract is void, merely for insufficiency and not for illegality, the other, if sufficient, will support the contract. (King v. King, 635.)

2. **CONTRACTS NOT TO MARRY** are void, as against public policy, but are not illegal. (*King v. King*, 635.)

3. **CONTRACTS TO CARE FOR ANOTHER, WITH AGREEMENT NOT TO MARRY.**—If a woman agrees to live with and take care of a man during his life, and not to marry during that time, in consideration of his promise to make her comfortable and well off, and she fully performs such services, but he fails to keep his agreement, she may, upon his death, maintain an action against his estate on the contract. In such case, although the promise not to marry is void, the main consideration is the labor and care, which, when performed, is sufficient to support the contract. (*King v. King*, 635.)

4. **CONTRACTS—CONSIDERATION.—WITHHOLDING COMPETITION**, when not contrary to public policy, is a sufficient consideration for a contract. (*Camden v. Dewing*, 797.)

5. **CONTRACTS.—ILLEGALITY** of a contract is never presumed, but must be proved, or must clearly appear upon the face of the contract. (*Burdine v. Burdine*, 741.)

6. **CONTRACTS.—PRICE IS ESSENTIAL** to a contract, and without this agreed upon no contract exists. (*State v. Associated Press*, 368.)

7. **CONTRACTS TO SUPPLY GOODS TO ANSWER NEEDS OF BUSINESS.**—If one agrees to furnish to another all ice that the latter may require in his business for the period of five years, and the latter agrees to buy such quantity for that period, the purchaser agrees to take ice for the period of five years, and the quantity which he agrees to take is to be measured by the necessities of his business which is presupposed to exist for the time agreed. The purchaser cannot, therefore, avoid liability on the contract by transferring his business within such period. (*Hickey v. O'Brien*, 227.)

8. **CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—LIABILITY.**—Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, and if, by some unforeseen accident the performance is prevented, he must pay damages for not doing it, no distinction being made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. (*Middlesex Water Co. v. Knappmann Whiting Co.*, 467.)

9. **CONTRACTS—PERFORMANCE—IMPOSSIBILITY OF, IMPOSED BY LAW.**—The performance of an express contract to do a particular thing is excused where the subsequent impossibility of performance is imposed by law. (*Middlesex Water Co. v. Knappmann Whiting Co.*, 467.)

10. **CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—EXISTENCE OF SUBJECT MATTER.**—The performance of an express contract is excused where the continued existence of something essential to the performance is an implied condition in the contract. (*Middlesex Water Co. v. Knappmann Whiting Co.*, 467.)

11. **CONTRACTS FOR PERSONAL SERVICES—IMPOSSIBILITY OF PERFORMANCE.**—The performance of contracts for purely personal services, where the life or health of the contracting party is essential to their execution, is excused by the death or illness of the contracting party. (*Middlesex Water Co. v. Knappmann Whiting Co.*, 467.)

12. **CONTRACTS—VALIDITY, ATTACK UPON—BURDEN OF PROOF.**—If a contract is valid upon its face, or if, taken in the

light of the circumstances surrounding the parties at the time it was entered into, it appears to be valid, it is incumbent upon him who attacks it to show its invalidity. (*Forsyth Mfg. Co. v. Castlen*, 28.)

See Architects; Building and Loan Associations; Constitutional Law, 16; Evidence, 8-10.

CORPORATIONS.

1. **CORPORATIONS — ARTICLES OF INCORPORATION, AMENDMENT OF.**—While a statute requiring the filing of original articles of incorporation with the secretary of state is mandatory, and applies equally to every amendment thereof which is fundamental, yet a failure to file an amendment which is not fundamental, such as an increase of the number of the board of directors, is not fatal, and forms no basis for a direct action by the state to forfeit the charter of the corporation. (*Jackson v. Crown Point Min. Co.*, 651.)

2. **CORPORATIONS—AMENDMENT OF ARTICLES.**—A failure to file an amendment to the articles of incorporation of a corporation which is not fundamental, and which in no way changes the character of the corporation or the scope of its powers, but simply increases the number of its agents, who shall act as directors in carrying out the objects of its creation, does not invalidate the acts of such agents, which are within the corporate powers of the company, especially as to stockholders who may have participated in the meeting at which such amendment was made, without objecting thereto, and who voted to increase the number of directors. (*Jackson v. Crown Point Min. Co.*, 651.)

3. **CORPORATIONS—AMENDMENT OF ARTICLES—ESTOPPEL AGAINST THIRD PARTIES OR STOCKHOLDERS.**—Any failure of a corporation to file amendments to its articles of incorporation or to otherwise comply with the provisions of a statute, which falls short of justifying proceedings on the part of the state to forfeit its charter, is not fundamental, and stockholders or third parties may, by their acts, be estopped from setting up such failure as a bar to the enforcement of their obligations to the corporation. (*Jackson v. Crown Point Min. Co.*, 651.)

4. **CORPORATIONS—INCREASE OF CAPITAL STOCK—WHEN BINDING THOUGH NOT RECORDED.**—If all the stockholders of a corporation, after notice, meet and adopt a resolution to increase the capital stock, and money is handed to the manager to cover the cost of recording certificates in the offices of the county clerk and secretary of state, there is an increase of stock de facto, and one who buys stock after such increase cannot recover its value from the officers of the corporation, on the ground that the failure to record the resolution rendered the attempt to increase the capital stock inoperative. (*Hoeft v. Kock*, 159.)

5. **CORPORATIONS—ASSOCIATED PRESS—ABDICATION OF POWERS.**—A corporation may abdicate all rights conferred upon it. Hence, an incorporated news association may so amend its charter as to eliminate power conferred in the original charter to conduct a telegraph and telephone business and to exercise the right of eminent domain. (*State v. Associated Press*, 368.)

6. **CORPORATIONS—LIABILITY FOR TORTS.**—A voluntary association of persons for benevolent purposes who procure a charter for certain specified purposes, and whose affairs and property are regulated and managed, not by the state, but by its own corpo-

rate officials, is a private, and not a public, corporation and is responsible for its torts. (*Trevett v. Prison Assn.*, 727.)

See Associations; Water Companies.

COSTS.

COSTS—LIABILITY OF "NEXT FRIEND."—If an action is brought and voluntarily dismissed by the next friend of an alleged imbecile, it is erroneous to tax costs against the latter and enter judgment against him therefor. In such case, the next friend is primarily liable for the costs, the estate of the imbecile being liable over, provided the fact that he is an imbecile and that the action was brought in good faith is proved. (*Nance v. Stockburger*, 22.)

See Marriage and Divorce, 12.

COTENANCY.

1. COTENANCY—ACCOUNTING FOR COAL TAKEN.—If one cotenant takes coal from the common property, without the consent of the other, the former thereby commits waste, for which he must account. He cannot avoid such accounting on the ground that the portion of the common property furnishing the coal is no more than his just share of such property. (*Cecil v. Clark*, 802.)

2. COTENANCY—EXCLUSION OF COTENANT.—If a cotenant in possession excludes his cotenant, he must account, although the tenant in possession does not take more than his just share of the rents and profits. (*Cecil v. Clark*, 802.)

3. COTENANT IN POSSESSION, WHEN NEED NOT ACCOUNT FOR PROFITS.—If a cotenant in possession does not exclude his cotenant, but uses the land for a purpose legal between cotenants, he is not liable to account for the profits or proceeds of such use. (*Cecil v. Clark*, 802.)

See Partition.

COUNSEL.

See Attorney and Client.

COURT.

See Mandamus, 1, 2.

COURT REPORTERS.

1. COURT REPORTER'S RIGHT TO COMPENSATION.—A party to an action is liable to a court reporter for copies of evidence furnished him by such reporter during the trial, although the litigant does not know that such copies must be paid for in addition to the stenographer's pay as court reporter. His duties are defined by statute, of which the litigant must take notice. (*Miller v. Palmer*, 107.)

2. ATTORNEY AND CLIENT—COMPENSATION OF COURT REPORTER—EVIDENCE.—The claim of a court reporter for compensation for copies of evidence furnished a litigant during the trial is not affected by the amount paid by such litigant to his attorney as fees nor his understanding, unknown to the reporter, as to how or by whom the latter is to be paid. (*Miller v. Palmer*, 107.)

See Attorney and Client, 1; Trial, 9.

CRIMINAL LAW.

1. **PARENT AND CHILD—CRIMINAL LAW—PUNISHMENT OF CHILD.**—Whether a parent who inflicts corporal punishment on a child is acting in good faith, prompted by parental love without passion, is a matter to be determined largely from the character of the injuries received by the child, and any instructions which lead to the conclusion that it is incompetent for the jury to differ from the parent as to whether the latter had gone too far would be misleading and erroneous. (*State v. Washington*, 141.)

2. **CRIMINAL LAW—DEGREE OF PROOF.**—There is no principle of law which requires, authorizes, sanctions, or approves the proposition that "the greater the crime, the stronger is the proof required for conviction." (*State v. Johnson*, 139.)

See Indictment; Former Conviction.

CROPS.

See Chattel Mortgage, 2.

CUSTOM.

1. **CUSTOM MUST BE IMMEMORIAL.**—A right in land cannot, in New Jersey, be acquired by common-law custom, since such a custom, as distinguished from a usage of trade, must be immemorial, which, in New Jersey, is impossible. (*Albright v. Cortright*, 504.)

2. **CUSTOM MUST BE LOCAL.**—A right claimed by way of custom, and which is laid in the whole public, is bad because too comprehensive, for a common-law custom is local, having respect to the inhabitants of a particular place or district. (*Albright v. Cortright*, 504.)

See Fishing; Prescription.

DAMAGES.

See New Trial, 1, 2; Replevin, 3.

DEEDS.

1. **DEEDS—ESCROW—VALIDITY.**—A deed placed in escrow beyond the control of the grantor, to be delivered to the grantee upon the grantor's death, is valid. (*Fulton v. Priddy*, 201.)

2. **DEEDS—ESCROW.—THE CONDITION** upon which a deed placed in escrow is to be delivered need not be in writing, but may rest in parol, or partly in writing and partly in parol. (*Fulton v. Priddy*, 201.)

3. **DEEDS — ESCROW — ALTERATION — REDELIVERY — WITNESSES AND ACKNOWLEDGMENT.**—A deed not witnessed is good between the parties, notwithstanding a statute which requires deeds to have witnesses and to be acknowledged. Hence, if a deed placed in escrow, to be delivered to the grantee upon the grantor's death, contains a clause making it subject to the grantor's recall, but the grantor afterward alters the deed by erasing such clause, and again places it in escrow, the instrument is valid and effectual to pass title, though, as changed, it is not witnessed or acknowledged. (*Fulton v. Priddy*, 201.)

4. **DEEDS—DESIGNATION OF GRANTEE.**—A deed of real estate, to be effective as a conveyance, must designate a grantee; but

It is not indispensable that the grantee's name should be stated, if the instrument so identifies him that there is no reasonable doubt respecting the party constituted grantee. Hence, a deed which recites that the consideration was paid by a named person, sufficiently designates him as the grantee, and is valid. (*Henniges v. Paschke*, 588.)

5. CONVEYANCES—TITLE DEEDS—LIENS.—Under registry laws and statutes of conveyances, the deposit of title deeds creates no lien as against subsequent bona fide purchasers or encumbrancers. (*Kelly v. Lehigh Min. etc. Co.*, 736.)

6. CONVEYANCES—RIGHT TO TITLE DEEDS.—A grantee is not, as matter of law, entitled to demand of his grantor the original muniments of title, under statutes making the records furnish evidence of title, and copies therefrom, equally with the originals, admissible in evidence. (*Kelly v. Lehigh Min. etc. Co.*, 736.)

7. EQUITY—JURISDICTION—DELIVERY OF TITLE PAPERS.—A court of equity has jurisdiction to decree the specific delivery of title papers to heirs, devisees, and other persons properly entitled to the custody and possession thereof if they are wrongfully detained or withheld from them. (*Kelly v. Lehigh Min. etc. Co.*, 736.)

8. DEEDS—MISDESCRIPTION.—A commissioner's deed conveying more than the former owner is entitled to is void as to the excess, and the grantee takes only what the former owner had title to. (*Scott v. Moore*, 749.)

9. DEEDS—APPURTENANCES—WHAT PASS AS.—When property is conveyed, everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as an incident to the principal thing or as a part of it, provided such privileges or quasi easements are necessary for the reasonable and convenient enjoyment of the granted premises. (*Scott v. Moore*, 749.)

10. DEEDS—EASEMENTS PASSING BY GRANT.—If an owner of adjoining lots sells them at the same time to different purchasers, each grant carries all the apparent and continuous easements which are necessary for the reasonable use of the property granted, and which have been, or are at the time of the grant, used by the grantor for the benefit of such property. (*Scott v. Moore*, 749.)

11. DEEDS—EASEMENT PASSING BY.—A purchaser takes land with reference to the condition of the premises at the time of the grant, and if such condition clearly shows that an alleyway over the premises is and has been used, and is intended to be used, by the owner or occupant of the adjoining land, the purchaser takes subject to such use. (*Scott v. Moore*, 749.)

12. DEEDS OF INSANE PERSONS—VOIDABLE.—The deed of an insane person who has not been adjudged insane and placed under guardianship is merely voidable, such deed passing the title to the land to the grantee, subject to be defeated according to law. (*French Lumbering Co. v. Theriault*, 856.)

13. DEEDS OF INSANE PERSONS—JUDGMENT LIEN—DEATH OF INSANE GRANTOR.—A judgment against an insane debtor rendered after he has made a transfer of his real property will not be a specific lien on such property until after the conveyance is avoided; and if the debtor dies before the conveyance is avoided, the judgment creditor cannot by execution levy obtain a lien on such property which equity will protect. (*French Lumbering Co. v. Theriault*, 856.)

See Executors and Administrators, 14.

DEFINITIONS.

- Easement. (Albright v. Cortright, 504.)
- Estoppel. (Gjerstadengen v. Hartzell, 575.)
- Nuisance. (Metzger v. Hochrein, 842.)
- Rent. (Whithed v. St. Anthony etc. Co., 562.)

DEMURRER TO EVIDENCE.

See Evidence, 7.

DIVORCE.

See Marriage and Divorce, 11, 12.

DOWER.

1. DOWER—HOW MAY BE DEFEATED.—The title of a widow to dower in her husband's lands is liable to be defeated by every subsisting claim or encumbrance existing before her marriage and the inception of her right, and which would have defeated her husband's seisin. (Burdine v. Burdine, 741.)

2. DOWER—HOW DEFEATED—CONTRACT TO SELL LAND. If a man, before marriage, enters into a contract to sell land upon certain terms and conditions, which are thereafter performed, his widow is not entitled to dower in the land, although her husband dies without making a conveyance. (Burdine v. Burdine, 741.)

3. DOWER—HOW DEFEATED—AGREEMENT TO MAKE DEVISE.—If a man, before his marriage, agrees to make a devise to another for a valuable consideration, paid or furnished, his widow, with knowledge of such agreement before her marriage, is not entitled to dower in the land agreed to be devised, although such devise is not made. (Burdine v. Burdine, 741.)

4. HUSBAND AND WIFE—DOWER—CONVEYANCE IN CONTEMPLATION OF MARRIAGE.—If a man who has entered into a contract of marriage, subsequently to such contract and before his marriage, voluntarily conveys a portion of his land to his sons without consideration, and without the consent or knowledge of his intended wife, the conveyance is in fraud of her marital rights, and upon his death she is entitled to dower in the land thus conveyed. (Ward v. Ward, 621.)

EASEMENTS.

1. EASEMENT—DEFINITION.—A profitable right in land cannot be an easement, since an easement is a privilege without profit. (Albright v. Cortright, 504.)

2. EASEMENTS AND SERVITUDES adopted by the owner of lands, which are plainly visible or notorious, and from the character of which it may be fairly presumed that he intended their preservation as necessary to the convenient enjoyment of his property, become, when the lands are divided and pass into other hands, permanent appurtenances thereto, and neither the owner of the dominant or of the servient portions of the land has power to adversely interfere with their proper use and enjoyment. (Scott v. Moore, 749.)

3. EASEMENTS—ABANDONMENT.—FAILURE TO USE AN ALLEYWAY, unaccompanied by proof of an intention on the part of the owner of the premises, or of some act done or permitted which

is inconsistent with the future enjoyment of the right, and which clearly indicates an intention to abandon the easement, is not sufficient to establish an abandonment thereof. (Scott v. Moore, 749.)

4. EASEMENTS—WAYS—ABANDONMENT.—A right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is an intentional abandonment of the former way. (Scott v. Moore, 749.)

5. EASEMENTS—ABANDONMENT BY ACTS IN PAIS.—A person entitled to a right of way or other easement in land may abandon and extinguish it by acts in pais, without deed or other writing, and a cessation of the use, coupled with any act indicative of an intention to abandon the right, has the same effect as an express release of the easement, without any reference whatever as to time. (Scott v. Moore, 749.)

6. EASEMENTS.—TO ESTABLISH AN ESTOPPEL against an easement, it is necessary that the representation or conduct relied upon should have been intended to influence the other party to act. If there is no such intent, the estoppel is not established. (Scott v. Moore, 749.)

7. EASEMENT — EXTINGUISHMENT — POSSESSION OF LAND.—Where one holds land by a defective or inchoate title, and a servitude upon or an easement in it by a valid title, the servitude or easement is not extinguished by unity of possession. (Smith v. Denniff, 408.)

See Deeds, 10, 12; Nuisance, 3; Waters and Watercourses, 14-23.

ELECTIONS.

See Wagers.

EMBEZZLEMENT.

1. EMBEZZLEMENT—INDICTMENT.—An indictment for larceny after a trust, alleging that the accused was intrusted with money "for the use and benefit" of a named person, and fraudulently converted it to his own use, is sufficient, and a further allegation that he converted it, "to the injury and without the consent" of the person named without alleging that any demand was made for the money is mere surplusage and may be disregarded. (Keys v. State, 63.)

2. EMBEZZLEMENT—INDICTMENT.—An indictment for larceny after trust, alleging that the accused was intrusted with specified lawful money for the use and benefit of a person named, is not demurrable on the ground that the trust is not sufficiently set out. (Keys v. State, 63.)

3. CRIMINAL LAW—VENUE—EVIDENCE.—Evidence that the accused was in a particular county intrusted with money, which he thereafter fraudulently converted to his own use, is sufficient to warrant a finding that the conversion took place in that county, in the absence of evidence that he ever left the county or that the conversion was made beyond its limits. (Keys v. State, 63.)

EMINENT DOMAIN.

See Railroads, 1-3; Waters and Watercourses, 10.

EQUITY.

EQUITY—JURISDICTION OF, NOTWITHSTANDING STATUTE.—If a court of equity has once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive equity of its jurisdiction, although the statute may furnish a full, complete, and adequate remedy at law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words. (*Kelly v. Lehigh Min. etc. Co.*, 736.)

See Judgments, 12, 13; Deeds, 7.

ESCROW.

See Deeds, 1-3.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

1. ESTOPPEL—ELEMENTS—TITLE TO LAND.—To constitute an estoppel with respect to the title of property, it must appear that the party making the admission by his declaration or conduct was apprised of the true state of his own title; that he made the admission with the intent to deceive, or with such careless and culpable negligence as to amount to constructive fraud; that the other party was destitute of knowledge of the true state of the title and of the means of acquiring such knowledge; and that he relied directly upon such admission, and will be injured by allowing its truth to be disproved. (*Gjerstadengen v. Hartzell*, 575.)

2. ESTOPPEL—NATURE—LOSS TO PARTY.—An estoppel was never intended to work a positive gain to a party. Its whole office is to protect him from a loss which, but for the estoppel, he could not escape. (*Gjerstadengen v. Hartzell*, 575.)

EVIDENCE.

1. EVIDENCE.—EXPERIMENTS are not competent as evidence unless the conditions under which they are made are the same, or proximately the same, as those which attended the event in regard to which the experiments are made. The admission of such evidence being discretionary with the trial judge, his decision cannot be reviewed, except in case of palpable abuse of such discretion. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

2. EVIDENCE—JUDICIAL NOTICE—PLACE OF TELEPHONE POLES.—A court will take judicial notice that telephone poles in a highway must be set near the side thereof, generally outside of the curb or ditch line, and, therefore, necessarily in line with trees in the highway. (*Wyant v. Central Tel. Co.*, 155.)

3. EVIDENCE—RULES OF.—CONGRESS HAS NO POWER to prescribe rules of evidence for a state court. Hence, it has no power to declare that certain written instruments not bearing internal revenue stamps shall not be received in evidence in any court. Such declaration can apply to courts of the United States alone, and not to state courts. (*Small v. Slocumb*, 50.)

4. EVIDENCE OF PECUNIARY CONDITION OF PLAINTIFF. In an action by a father to recover for the loss of services of his minor son, evidence of the plaintiff's pecuniary condition, the amount of his property, his earnings, and the size of his family, is inadmissible. (*Holdridge v. Mendenhall*, 871.)

5. TRIAL—EVIDENCE AT FORMER TRIAL—DISCREDITING PLAINTIFF.—Where a plaintiff testifies to an entirely different state of facts from that testified to at a former trial, the defendant, on a challenge of the good faith of the plaintiff's claim, may prove that at the former trial the plaintiff produced a witness to corroborate his story, such evidence not being received as proof of what was deposed, but to discredit the plaintiff. (*Bageard v. Consolidated Traction Co.*, 498.)

6. EVIDENCE—STATEMENTS OF WITNESS AT FORMER TRIAL.—Affidavits or statements of third persons used by a party are evidence against him in a subsequent controversy. They stand on the ground of admissions. (*Bageard v. Consolidated Traction Co.*, 498.)

7. DEMURRER TO EVIDENCE.—If, on a demurrer to evidence, the evidence is such that the court ought not to set aside the verdict in favor of the demurree, the court should give judgment against the demurrant. (*Lewis v. Chesapeake etc. Ry. Co.*, 816.)

8. CONTRACTS.—A PAROL CONTRACT that a debt evidenced by a check shall bear no interest, entered into before such check is drawn, cannot vary the terms of the written contract. (*Haynes v. Wesley*, 72.)

9. CONTRACTS—PAROL EVIDENCE TO VARY.—In order to render parol evidence admissible to make complete an incomplete written contract, the fact that such contract is incomplete must appear from its face by reason of patent ambiguity, or, although apparently complete on its face, in the light of evidence showing the circumstances surrounding the parties at the time the contract was executed, a latent ambiguity is made to appear. (*Forsyth Mfg. Co. v. Castlen*, 28.)

10. CONTRACTS—PAROL EVIDENCE TO VARY.—In order to permit parol evidence to be admitted to show an agreement collateral to the written contract, it must appear, either from the contract itself or from the surrounding circumstances, that the contract is incomplete, and what is sought to be shown as a collateral agreement must not in any way conflict with or contradict what is contained in the written contract. (*Forsyth Mfg. Co. v. Castlen*, 28.)

11. PLEADING AND EVIDENCE.—FACTS ADMITTED BY ANSWER need not be proved by plaintiff. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

See Witnesses.

EXECUTIONS.

1. JUDGMENT—PRESUMPTION OF PAYMENT—CHANGE OF LAW—EXECUTION.—A disputable presumption is a mere rule of evidence, in which a party can have no vested right, and which may be changed at the will of the legislature. Hence, where the law, at the time a judgment was rendered, raises a disputable presumption of payment after five years, and forbids execution thereon after such time without leave of court, the law may be changed so as to permit execution at any time without leave of court, and it will apply to existing judgments. (*Dakota Investment Co. v. Sullivan*, 584.)

2. EXECUTION—FAILURE TO COMPLY WITH STATUTE—VOIDABLE.—An execution issued after the lapse of the statutory period, without taking the steps prescribed by statute, is voidable merely, and not void, and all acts done under it before it is set aside are valid. (*Dakota Investment Co. v. Sullivan*, 584.)

8. EXECUTION SALE—CONFIRMATION—ATTACKING FOR IRREGULARITIES—APPEAL.—An order confirming an execution sale is a final order which is appealable, and the remedy of a party aggrieved thereby is by appeal, a failure to do which forever precludes him from attacking the judgment of confirmation on the ground of mere irregularities. (*Dakota Investment Co. v. Sullivan*, 584.)

See Homesteads, 6; Judgments, 3.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—COLLATERAL ATTACK ON APPOINTMENT—ACCOUNTING.—An administrator who, pursuant to the order and authority of a probate court, takes the property of an estate which belongs to minor heirs, and misappropriates and dissipates the same, cannot escape an accounting on the ground that his appointment was a nullity. (*Dobler v. Strobel*, 530.)

2. EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS OF ADMINISTRATION—EX PARTE APPLICATION.—While the court has a discretion in granting or refusing applications for letters of administration, yet when the proceeding is purely ex parte and a verified application shows the party entitled to letters, they should be granted. (*Ex parte Jenkins*, 114.)

3. EXECUTORS AND ADMINISTRATORS.—THE RIGHT TO LETTERS OF ADMINISTRATION does not depend upon the existence of tangible assets to administer upon, but the application should show some claim, or the right to enforce some claim, in favor of the estate. (*Ex parte Jenkins*, 114.)

4. EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS OF ADMINISTRATION.—If a sheriff negligently permits a prisoner to be taken from jail and killed, the widow of such prisoner is entitled to letters of administration on his estate, although the only tangible asset thereof is a right of action on the official bond of the sheriff. (*Ex parte Jenkins*, 114.)

5. COURTS OF ORDINARY—JURISDICTION—PRESUMPTION IN FAVOR OF JUDGMENTS OF.—A court of ordinary is a court of general jurisdiction, so far as matters relating to the estates of decedents are concerned, and has power to authorize the sale of property of a decedent for the purpose of paying debts or of distribution, and, when it renders a judgment, it is to be presumed that it had before it all the facts necessary to make such judgment valid and binding. (*Stuckey v. Watkins*, 47.)

6. ESTATES OF DECEDENTS—SALE OF PROPERTY TO PAY DEBTS—PRESUMPTION.—It is presumed in favor of the judgment of a court of ordinary, authorizing the sale of property of a decedent to pay debts, that there are debts due by the estate of the decedent, and that the property ordered to be sold is in law, subject to the payment of such debts. (*Stuckey v. Watkins*, 47.)

7. ESTATES OF DECEDENTS—PROBATE SALE OF HOMESTEAD—PRESUMPTIONS—BINDING EFFECT OF JUDGMENT. It is presumed in favor of a judgment of a court of ordinary ordering property of the decedent to be sold to pay debts, which property was, during the lifetime of the decedent, set apart to him as a homestead, that the court issued the order authorizing such sale for the reason that it was made to appear that there were debts due by the deceased which were superior to the homestead right,

and such judgment is binding upon all parties and their privies until reversed or set aside in the manner prescribed by law. (*Stuckey v. Watkins*, 47.)

8. EXECUTORS AND ADMINISTRATORS—MORTGAGE BY EXECUTORS—PERSONAL LIABILITY.—If an executor, under a power contained in the will to mortgage decedent's land to pay debts, mortgages such land to secure the payment of notes given by the executor as such, and the mortgage refers to the power in the will, and contains a personal covenant of the executor to pay the sum secured, upon default in the payment of the notes and the foreclosure of the mortgage and sale of the land, he is personally liable for any deficiency in the mortgage debt, although the proceeds of the mortgage were applied to the payment of decedent's debts and of liens upon the land mortgaged. (*De Coudres v. Union Trust Co.*, 95.)

9. EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY OF EXECUTOR.—The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held liable personally when he does not stipulate for exemption from such liability. (*De Coudres v. Union Trust Co.*, 95.)

10. EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY.—A person executing a conveyance in a representative capacity, such as executor, guardian, or trustee, with the covenants for title usual in other deeds, is personally bound by them, though he is under no obligation to make any of them, and has no authority to bind the estate he represented by such covenants. (*De Coudres v. Union Trust Co.*, 95.)

11. EXECUTORS AND ADMINISTRATORS—MORTGAGES—PERSONAL LIABILITY OF EXECUTOR.—The foreclosure of a mortgage executed by an executor upon the land of his decedent does not prove that the debt was the debt of the decedent's estate, and not that of the mortgagor, nor prevent the mortgagee from proceeding against the mortgagor personally for a deficiency in the mortgage debt after the foreclosure sale. (*De Coudres v. Union Trust Co.*, 95.)

12. EXECUTORS AND ADMINISTRATORS—SETOFF—CONFLICT OF LAWS.—An administrator in one state may set up a counterclaim for debts due the estate placed in the hands of a non-resident for collection prior to the decedent's death and collected after his death, against a claim set up by the nonresident in the state of administration for a balance due him on a debt of the decedent. Such counterclaim is not based on tort, but is for money had and received, and cannot be defeated for lack of mutuality. (*Bealey v. Smith*, 317.)

13. ADMINISTRATORS AND EXECUTORS—DEBT DUE FROM NONRESIDENT—COUNTERCLAIM—CONFLICT OF LAWS.—If an intestate, for many years a resident of one state, is temporarily in another state at the time of his death, and administration is had on his estate in both states, the administration in the former state is the principal administration, that of the other state being simply ancillary; and the situs of a debt due the estate by a resident of the state of ancillary administration is, for the purpose of counterclaim, in the state of the principal administration. (*Bealey v. Smith*, 317.)

14. ESTOPPEL—ADMINISTRATOR'S DEED.—The deed of an administrator purporting to convey land which, under a mistake of

law which is mutual to the administrator, the purchaser, and the probate court, is erroneously believed to belong to the estate, conveys no title, and cannot operate as an estoppel against the administrator or his heirs in asserting title to the property. (*Gjerstadengen v. Hartzell*, 575.)

15. ESTOPPEL.—ADMINISTRATOR'S DEED—PAYMENT OF DEBT TO ADMINISTRATOR.—An administrator who, upon the sale of property which is erroneously believed to belong to the estate, receives the entire proceeds in payment of a debt due him from the estate, is not estopped by such conduct, nor are his heirs, from subsequently asserting title to the property, where it appears that at the time the land was sold he was not the owner thereof, and was entirely innocent of any belief that he would subsequently acquire an interest therein, that he had no intention to deceive any one either by executing the deed or by presenting his claim against the estate, and that he died before learning that he had acquired title to the land. (*Gjerstadengen v. Hartzell*, 575.)

EXEMPTIONS.

See Attachment and Garnishment, 2-4.

EXPERIMENTS.

See Evidence, 1.

FIREWORKS.

See Negligence, 1.

FISHING.

1. FISHING—PRESCRIPTION—CUSTOM.—The right of the public to fish in nontidal waters which cover the land of another cannot be acquired by custom, however long the practice has continued, or by prescription. Therefore, one who fishes in such waters, though forbidden to do so by the owner of such land, cannot justify by the long-continued usage of the public. (*Albright v. Cortright*, 504.)

2. FISHING—STREAM STOCKED BY STATE.—A member of the public, merely as such, has no right to enter the land of another in order to get at something which is devoted to the public. Hence, where the state has, for the benefit of the public, stocked with fish a nontidal stream which crosses the land of another, one has no right against the protest of the owner to cross such land for the purpose of fishing in the stream. (*Albright v. Cortright*, 504.)

FORMER CONVICTION.

1. CRIMINAL LAW.—FORMER CONVICTION may be a bar to a subsequent prosecution, although not had upon a formally sufficient charge. A defective charge may sustain a former conviction. (*State v. Bogard*, 84.)

2. CRIMINAL LAW.—FORMER CONVICTION upon a defective affidavit not stating any charge known to the law as a criminal offense is not a bar to any subsequent prosecution. (*State v. Bogard*, 84.)

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—VOID MEANS VOIDABLE.—UNDER A STATUTE providing that every conveyance of

any estate or interest in lands made with the intent to hinder, delay, or defraud creditors shall be void, the term "void" means voidable, because the conveyance vests title in the vendee subject to the right of defrauded creditors to avoid it. (*French Lumbering Co. v. Theriault*, 856.)

2. JUDGMENT LIENS—LAND FRAUDULENTLY CONVEYED.—A judgment against a fraudulent vendor of real property, entered subsequently to the fraudulent transfer, and which has been duly docketed in the county where such real estate is located, does not of itself create a lien on such property, because the conveyance vests in the fraudulent vendee the title of his vendor subject to the right of the defrauded creditors at their election to avoid it. (*French Lumbering Co. v. Theriault*, 856.)

3. JUDGMENT LIENS—LANDS FRAUDULENTLY CONVEYED BEFORE JUDGMENT—HOW TO PERFECT LIEN.—A judgment, standing alone, which was rendered after the debtor had fraudulently conveyed his real property constitutes a mere right to acquire a lien upon such property, which requires the issuance of a writ of execution or of attachment and an actual seizure of the property thereunder, in order to ripen into such an interest in the property as will be recognized by a court of equity in an action to remove a cloud thereon by the owner of such interest. (*French Lumbering Co. v. Theriault*, 856.)

4. JUDGMENT LIENS—FRAUDULENT TRANSFER—CREDITOR'S RIGHTS IN EQUITY.—A judgment creditor, as against whom real property has been fraudulently conveyed prior to the entry of his judgment, can avoid such transfer and obtain a specific lien upon the property only by a seizure thereof under a writ of attachment or execution, or, after the exhaustion of all legal remedies to collect the debt without success, by an appeal to a court of equity to remove the impediment to the judgment attaching to the property. (*French Lumbering Co. v. Theriault*, 856.)

5. JUDGMENT LIENS—FRAUDULENT TRANSFER—DEATH OF DEBTOR—CREDITOR ACQUIRING LIEN.—If a fraudulent vendor of real property dies before his judgment creditor obtains a specific lien on such property, the judgment creditor cannot, by execution against the property, secure a lien thereon which equity will protect. (*French Lumbering Co. v. Theriault*, 856.)

6. FRAUDULENT CONVEYANCES—SUIT TO SET ASIDE.—A SURETY who has not paid the debt of his principal cannot maintain a suit to have the latter's fraudulent conveyance of property set aside and the property applied to the payment of the debt. (*Ellis v. Southwestern Land Co.*, 909.)

See Attachment and Garnishment, 1; Dower, 4; Husband and Wife, 1

GAMBLING.

See Lotteries; Wagers.

GAME.

See Fishing.

GAS.

See Partition.

GUARDIAN AND WARD.

See Costs; Judgment, 6; Trusts, 1.

HERDING SHEEP.

See Trespass, 5.

HIGHWAY.

See Constitutional Law, 15; Municipal Corporations, 3, 4.

HOMESTEADS.

1. **HOMESTEAD—VALUE—EFFECT OF EXCESS.**—Under a statute providing that a homestead consists of the dwelling-house and the land on which it is situated, that the quantity of land selected shall not exceed a certain amount or value, and that from the time the declaration is filed the premises therein described constitute the homestead, with provisions as to the method of subjecting the excess value of a homestead to execution, the homestead character is impressed upon all the property described in the declaration of homestead, although its value exceeds the amount allowed. (Vincent v. Vineyard, 423.)

2. **HOMESTEAD—JUDGMENT LIEN—MORTGAGE OF HOMESTEAD.**—Where judgments constitute liens upon real property, and the homestead law provides that homesteads shall be subject to execution in satisfaction of judgments obtained before the declaration of homestead is filed, and which constitute liens upon the property therein described, but that no judgments obtained prior to a certain date shall constitute liens upon the property, a judgment docketed prior to such date is not a lien upon a homestead acquired subsequent to such date, whatever its value, and a mortgage of the homestead takes precedence over such judgment. (Vincent v. Vineyard, 423.)

3. **HOMESTEAD—JUDGMENT CREDITORS—EXCESS VALUE OF HOMESTEAD.**—Under the statutes of Montana authorizing a judgment creditor without a lien to subject the value of a homestead above two thousand five hundred dollars to the satisfaction of his claim, such a creditor must present a verified petition to the court or judge showing that an execution has been levied upon the homestead and that the value of the homestead exceeds the amount of the exemption; after proof of these facts and of notice to the homestead claimant, the judge must appoint appraisers, and upon their report that the value of the homestead exceeds two thousand five hundred dollars, and that the property can be divided without injury, execution can be enforced against the excess, but if the property cannot be divided, a sale must be ordered and the execution paid from the excess over two thousand five hundred dollars. (Vincent v. Vineyard, 423.)

4. **HOMESTEAD—MORTGAGE OF—SATISFACTION OF.**—The mortgage of a homestead operates as a waiver of the homestead exemption in favor of the mortgagee and of those claiming under him, but the waiver does not inure to the benefit of other persons. Therefore, such a mortgagee is not required to satisfy his mortgage debt out of the amount representing the homestead exemption, as against judgment creditors who have no lien on the homestead property. (Vincent v. Vineyard, 423.)

5. **HOMESTEAD—MORTGAGE OF—PAYMENT.**—The entire homestead is subject to sale in satisfaction of judgments obtained

on debts secured by mortgages on the premises, and which are recorded before the filing of the declaration of homestead. (*Vincent v. Vineyard*, 423.)

6. HOMESTEADS—EXECUTION SALE OF—SETTING ASIDE.—If the execution defendant is the head of a family, and provides for the support of his aged mother from the proceeds of land sold under execution and from his own labor, and such land has been selected and used as a homestead for the support of his family, and notice has been served upon the sheriff, before the sale, that the land is claimed as a homestead, and a declaration of homestead has been duly filed, such execution sale must be set aside, especially if such land is all that the homestead claimant owns and its value does not exceed the statutory limit. (*Bunker v. Coons*, 680.)

7. HOMESTEADS—ABANDONMENT.—The temporary absence of a homestead claimant from his residence for a year or two at one time, when attending to his business out of the state, in order to earn money with which to assist in providing for his family, coupled with a bona fide intention to return to, and to reside and build a house upon, the land, and the fact that he visits at his home during such absence does not constitute an abandonment of the homestead right. (*Bunker v. Coons*, 680.)

8. HOMESTEADS—NECESSITY OF DWELLING UPON LAND.—The fact that there is no dwelling-house upon the land claimed as a homestead, and that the claimant's mother resides with him one-half mile therefrom, does not deprive him of his homestead right, if it appears that the products of the land are used for the support of the family, and its value is within the homestead limit. (*Bunker v. Coons*, 680.)

9. HOMESTEADS—HEAD OF FAMILY.—A man with whom his mother resides, and by whom she is cared for and maintained is the head of a family, and his actual residence upon the land claimed as a homestead is not necessary to render it exempt from execution. (*Bunker v. Coons*, 680.)

10. HOMESTEADS—HEAD OF FAMILY—RESIDENCE.—A head of a family resides on the homestead when he has the care and maintenance of a family who reside on or near the homestead, or some part of it, and who derive their support, in whole or in part, from the products of such land used or intended, in good faith, as a homestead. (*Bunker v. Coons*, 680.)

11. HOMESTEADS—WAIVER IN ADVANCE.—A homestead right, when vested in the head of a family, cannot be waived by contract in advance of the assertion of the homestead right. Such a contract or waiver is against public policy. (*Bunker v. Coons*, 680.)

See Husband and Wife, 3.

HOMICIDE.

See Indictment, 2.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—LIABILITY OF SEPARATE ESTATE OF WIFE ON HER CONTRACTS—LAW OF KANSAS.—The separate estate of a married woman is, under the statute of Kansas, answerable in an appropriate action at law for the payment of her promissory note, though its only consideration was a credit extended to her husband. (*State Bank of Eldorado v. Mason*, 196.)

2. CONTRACTS OF MARRIED WOMEN—ENFORCEMENT OF—CONFLICT OF LAWS.—Under a contract made in Michigan, a wife's property is not liable for her husband's debt, unless the contract specifically binds such property by express written agreement of the wife; but under the statute of Kansas a wife's property is liable upon her contracts. Hence, if a married woman, a resident of Kansas, is indebted in that state upon a note signed by her for the benefit of her husband, and has property in Michigan, the Kansas creditor may enforce payment of the debt in Michigan by an attachment of her property in the latter state. (*State Bank of Eldorado v. Maxson*, 196.)

3. HUSBAND AND WIFE—TRANSFER OF HOMESTEAD TO WIFE—EFFECT ON CREDITORS.—The conveyance of a homestead by a husband to his wife cannot be in fraud of creditors, either as to the land itself or as to crops subsequently produced thereon by the wife. (*Olson v. O'Connor*, 595.)

4. HUSBAND AND WIFE—WIFE OWNING LAND—TITLE TO CROPS.—Where a wife is the owner of land and entitled to its use, the crops grown thereon are, presumptively, hers, and the right of her husband to crop the land must be founded upon a transfer to him of such right in some form which the law would recognize as having that effect. (*Olson v. O'Connor*, 595.)

5. HUSBAND AND WIFE—HUSBAND MANAGING WIFE'S PROPERTY—TITLE TO PROFITS.—The gratuitous contribution of a husband's time and skill to the management of his wife's property creates no title to its profits or increase in him. The mere fact that a husband gratuitously devoted his labor and time to producing a crop on his wife's land has no legal efficacy to vest the title of such crop in him. (*Olson v. O'Connor*, 595.)

See Dower; Insurance, 13; Witnesses, 1, 2.

IMPROVEMENTS.

See Betterments; Partition, 4-6.

INDEPENDENT CONTRACTOR.

See Negligence, 1.

INDICTMENT.

1. INDICTMENT—FORM OF.—An indictment is bad and of no effect if it fails to state that the grand jurors "upon their oath" charge the defendant with the crime mentioned in the indictment, or "upon their oaths do say" that he committed such crime. (*State v. Sanders*, 330.)

2. CRIMINAL LAW—INDICTMENT.—The word "their" preceding "malice aforethought" in an indictment charging two or more persons with murder is sufficient. It is not necessary to use the word "defendants" in such place in the indictment. (*State v. Johnson*, 139.)

3. CRIMINAL LAW—INDICTMENT—PROOF.—Under an indictment for the "willful and malicious infliction with a dangerous weapon, or with intent to kill, of a wound less than mayhem," charging the infliction of such wound with a dangerous weapon consisting of "a piece of iron," it is not essential to the crime that the wound should have in fact been inflicted with the particular weapon specified, and if it is proved without objection that the wound was willfully and maliciously inflicted with a dangerous

weapon of another kind, such proof is sufficient to sustain the indictment. (*State v. Washington*, 141.)

See Embarrassment, 1, 2.

INFANTS.

See Insurance, 14, 15.

INJUNCTIONS.

INJUNCTIONS AGAINST ACTIONS AT LAW.—Several actions at law cannot be restrained by injunction if no general principle is involved conclusive as to all of them, or if the complainant has not already established his right at law. (*Albert Lea v. Nielsen*, 242.)

See Vendor and Vendee; Waters and Watercourses, 27.

INSANE PERSONS.

See Deeds, 12, 13.

INSTRUCTIONS.

1. TRIAL.—INSTRUCTIONS REQUESTED NEED NOT BE GIVEN when they are fully covered by instructions already given. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

2. TRIAL.—INSTRUCTIONS.—The giving of inconsistent or contradictory instructions on a material point in the case is error. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

3. TRIAL.—INSTRUCTIONS.—After the trial court has instructed the jury that the accused is charged with having committed the offense alleged in the county named in the indictment, and that this makes the issue to be determined, it is not necessary to charge in connection with each legal proposition involved that it must appear that the offense was committed in such county. (*Keys v. State*, 63.)

4. TRIAL.—INSTRUCTIONS—CHARACTER.—A charge that "defendant has introduced some evidence of good character," which must be considered along with other evidence in the case in determining his guilt or innocence, is not erroneous, either because of the use of the word "some" or because of a failure to more particularly instruct with reference to the law of good character. (*Keys v. State*, 63.)

See Appeal, 7, 8.

INSURANCE.

1. INSURANCE—ARBITRATION AS BAR TO CLAIM FOR TOTAL LOSS.—If the insured insists that the loss is total, an agreement to arbitrate or an arbitration had fixing the amount does not preclude him from bringing suit as for a total loss and recovering therefor, if the evidence establishes his claim. (*Pennsylvania Fire Ins. Co. v. Drackett*, 608.)

2. INSURANCE—TOTAL LOSS—WHAT IS.—If a loss by fire is such that the identity and specific character of the building insured are destroyed, and it can no longer be called a building, and the portions that remain cannot be utilized to advantage in rebuilding, the loss is total. In such case all of the material composing

the building need not be destroyed, in order to constitute a total loss. (*Pennsylvania Fire Ins. Co. v. Drackett*, 608.)

3. INSURANCE—WAIVER OF PROOF OF LOSS.—If an insurer investigates the cause of a fire injuring property insured by him, and thereby obtains information sufficient to determine the amount of his liability, expressly recognized by him, and prepares proof of loss from information thus obtained, but the insured refuses to sign such proof of loss because of a stipulation of settlement therein contained, the failure of the insured to make and serve formal proof of loss is thereby waived. (*Larkin v. Glens Falls Ins. Co.*, 286.)

4. INSURANCE—MUNICIPAL ORDINANCES AS PART OF CONTRACT—FIRE LIMITS.—Municipal ordinances creating and establishing fire limits are a part of a contract of insurance upon property within such limits, and the insurer is bound thereby. Hence, a contract of insurance upon property within the fire limits of a city is presumed to have been entered into with reference to its ordinances regarding the alteration and repair of buildings damaged by fire. (*Larkin v. Glens Falls Ins. Co.*, 286.)

5. INSURANCE—LOSS WITHIN FIRE LIMITS—AMOUNT OF RECOVERY.—If a policy of insurance is upon a building of such material and character and situation, with relation to fire limits, that it cannot be repaired because of a city ordinance prohibiting such repair, a recovery may be had for a total loss, except that the value of what remains of the building after the fire, over and above the cost of removing it from the premises, must be deducted therefrom. (*Larkin v. Glens Falls Ins. Co.*, 286.)

6. INSURANCE.—MUNICIPAL ORDINANCES establishing fire limits within a city may authorize an inspector of buildings appointed by the city to condemn insured buildings totally or partially destroyed by fire, and to refuse a permit to repair them, and when such inspector determines that a damaged building shall not be repaired, it is unlawful to repair it, and the loss becomes total to the insured. (*Larkin v. Glens Falls Ins. Co.*, 286.)

7. INSURANCE—FORFEITURE—ENTIRETY OF CONTRACT.—Under an open marine policy of insurance containing a warranty that all risks shall be reported to the insurer as soon as known to the insured, a failure to report known risks constitutes a breach of the policy as an entirety at the option of the insurer as to all existing and future shipments, and not merely as to risks not reported. (*Camors v. Union Marine Ins. Co.*, 128.)

8. INSURANCE—MARINE—FORFEITURE.—ACCEPTANCE AFTER ARRIVAL OF CARGO OF PREMIUMS on risks not properly reported, under an open marine policy of insurance containing a warranty that all risks shall be reported to the insurer as soon as known to the insured, is not a waiver of the warranty so as to estop the insurer from forfeiting the policy on a loss on the ground of previous failure to report risks promptly. (*Camors v. Union Marine Ins. Co.*, 128.)

9. INSURANCE—MARINE—FORFEITURE.—Under a warranty in an open marine insurance policy that all risks shall be reported to the insurer as soon as known to the insured, the fact that an epidemic of sickness prevailed, and that the sickness of the clerks of the insured caused him to fail to make prompt reports of risks, does not prevent a breach of such warranty and a vacating of the policy. (*Camors v. Union Marine Ins. Co.*, 128.)

10. INSURANCE—MARINE—FORFEITURE.—Under a warranty in an open marine policy of insurance that all risks shall be re-

ported to the insurer as soon as known to the insured, the fact that the insurer retains notice of other risks after a loss does not estop him from insisting on a breach of the warranty, provided he has not received and retained premiums on risks reported, or done any affirmative act in respect to them. (*Camors v. Union Marine Ins. Co.*, 128.)

11. LIFE INSURANCE—PROOF BY CIRCUMSTANCES THAT NOTE WAS GIVEN AS PAYMENT OF PREMIUM.—If a question arises as to whether a note given to a life insurance company was taken as mere evidence of a debt, or as part payment of the first premium on an application for insurance, the burden is upon him who asserts that it was taken as payment of the premium, and if the circumstances relied on to prove the contract point one way as reasonably and significantly as the other, there is presented a question of law for the court to decide. (*McDonald v. Provident Sav. etc. Soc.*, 885.)

12. LIFE INSURANCE—FIRST PREMIUM—PAYMENT OF, WHEN NOT WAIVED BY TAKING NOTE.—IN AN ACTION upon a life insurance policy, where the defense is that the first premium was not paid, or payment thereof waived, and that the policy never went into effect, there can be no recovery where the evidence shows that the application was accompanied by the applicant's ten-day note for the amount of the first premium, together with a memorandum indorsed on the note that it was to be returned if not accepted; that the application and policy both provided that the insurance should not become binding until the first premium was actually paid, but that the risk was accepted by a general agent having power to bind the company by a waiver of this provision; that the agent, upon receiving the policy and customary voucher or receipt, tendered them to the applicant and demanded payment of the note; that the maker excused nonpayment, whereupon the agent delivered the policy to him, but retained the voucher and the note; that the agent then left the note, with the voucher, in a bank for collection, with directions that the voucher be delivered upon payment of the note; that, at the maker's request, the time for payment of the note was extended, such extension being made, however, as an extension of the time for payment of the premium; and that the applicant died without paying the note, as no express agreement to waive the provision as to payment of the premium and to accept the note in lieu thereof is thereby shown. Nor does evidence that the note was taken to "tie" up the insured show, or even tend to show, that the obligation to pay should be deemed an actual payment. Under such circumstances, the court should direct a verdict for the defendant. (*McDonald v. Provident Sav. etc. Soc.*, 885.)

13. INSURANCE—LIFE—RIGHT OF DIVORCED WIFE TO.—If a married woman is named as beneficiary in an insurance policy on the life of her husband, she is entitled to the proceeds of the policy, although their marital relations are terminated by divorce or otherwise prior to his death. (*Overhiser v. Overhiser*, 612.)

14. INSURANCE—LIFE—MINORS.—A policy of insurance on the life of a minor, payable to him, if living, at maturity, and to his executors, administrators or assigns, if he dies before maturity, together with the notes given by him for premiums thereon, is not void, though voidable. Nor is the minor's assignment of the policy during his minority necessarily void. (*Union Cent. Life Ins. Co. v. Hilliard*, 644.)

15. INSURANCE—LIFE—MINORS—CONSIDERATION FOR CONTRACT.—The obligation of an insurer to pay a policy on the

life of a minor to him, if living at maturity, on the happening of the event contemplated, is a sufficient consideration to support a promise to pay premiums, whether such promise is made by the insured alone, or by another jointly with him. (*Union Cent. Life Ins. Co. v. Hilliard*, 644.)

16. **INSURANCE—LIFE—WAGERING CONTRACT.**—If a borrower from an insurer, as additional security for a loan, takes a policy on the life of another and assigns it to the insurer, such policy is not void as a wagering contract, though procured by a person who has no insurable interest in the life of the insured, and who joins in a promise evidenced by notes to pay the premiums. (*Union Cent. Life Ins. Co. v. Hilliard*, 644.)

17. **INSURANCE—LIFE—USURY.**—If a borrower from an insurer procures a loan upon a lawful rate of interest, giving a real estate mortgage as security and also a life insurance policy procured by him on a life in which he has no insurable interest, and for which he signs premium notes with the insured in order to give value to the policy as collateral security for the loan, the premiums paid and agreed to be paid upon such policy cannot be regarded as additional interest for the loan so as to render it usurious. (*Union Cent. Life Ins. Co. v. Hilliard*, 644.)

See Associations.

INTERSTATE COMMERCE.

1. **CONSTITUTIONAL LAW—INTERSTATE COMMERCE.**—A municipal ordinance under which license fees are exacted from the owners of tugs, towboats, or barges engaged in the coasting trade between different states, and licensed therefor under the Revised Statutes of the United States, for the privilege "of towing boats into or out of the harbor, or from one place to another within such harbor," is void as an unwarrantable interference with commerce between the states, although such ordinance provides that the amount paid for such license "shall be in lieu of all wharfage during the time said license remains in force." (*St. Louis v. Consolidated Coal Co.*, 310.)

2. **CONSTITUTIONAL LAW—INTERSTATE COMMERCE.**—A wharfage charge may lawfully be demanded by municipal ordinance of vessels engaged in the coasting trade between different states and licensed by the United States, but the city cannot legally exact a license tax from such vessels for the privilege of navigating so much of a river or harbor as lies within the city limits. Such license tax is an unwarranted interference with interstate commerce and void. (*St. Louis v. Consolidated Coal Co.*, 310.)

3. **CONSTITUTIONAL LAW—INTERSTATE COMMERCE—SALES BY SAMPLE.**—A municipal ordinance imposing a license tax upon a resident of the state who solicits orders for the sale of goods by sample, solely for a nonresident owner, and who forwards such orders and receives a commission on sales made, imposes a direct burden upon interstate commerce, and is void as beyond the power of the city to enact. Such ordinance is not a valid exercise of the police power of the state, but is a pure revenue measure. (*Adkins v. Richmond*, 705.)

JUDGMENTS.

1. **JUDGMENT—CAUSE OF ACTION—LEAVE OF COURT.**—A cause of action upon a judgment accrues when the judgment is rendered, and is complete without obtaining leave of court to sue thereon. (*Osborne v. Lindstrom*, 516.)

2. JUDGMENT LIEN—EXTENSION OF BY COURTS.—The duration of judgment liens is dependent upon the express will of the legislature. The courts have no power to extend them, nor have they the right when the language employed by the legislature is unambiguous, by construction, to make exceptions or qualifications to meet the hardship of particular cases. To do so is a usurpation of legislative power. (*Smith v. Schwartz*, 670.)

3. JUDGMENT LIENS—EFFECT OF LEVY OF EXECUTION. The levy of an execution upon real estate, during the time that the judgment upon which the execution issued was a lien, neither extends the lien, nor does it create a new lien upon the property. (*Smith v. Schwartz*, 670.)

4. JUDGMENTS—LIEN OF—WHEN MORTGAGE LIEN TAKES PRIORITY.—If a justice's judgment becomes a lien upon land by being duly docketed, but before its enforcement by levy and sale, a mortgage lien against the same land accrues, and thereafter the time limited by statute for the lien of the judgment expires, and the judgment is renewed, the mortgage lien attaches as a first lien, and a sale under the renewed judgment does not affect the mortgage lien. (*Smith v. Schwartz*, 670.)

5. JUDGMENT—PRESUMPTION—SILENCE OF RECORD AS TO FACT.—No presumption will be indulged in favor of a judgment, where the record is silent as to some fact, if the presumption violates an express statutory requirement in a proceeding purely statutory. (*In re Estate of McCormick*, 890.)

6. JUDGMENTS—RES JUDICATA—SURETIES.—A determination of the probate court as to the amount due from a guardian to his ward, made after due notice to such guardian, is final and conclusive against the sureties on the guardian's bond in an action thereon. (*Cross v. White*, 267.)

7. JUDGMENT—RES JUDICATA—WHAT FACTS ARE INCLUDED.—A judgment is binding upon parties and privies as to the final result pronounced and the facts established or assumed upon which it is based. (*State v. McDonald*, 878.)

8. JUDGMENT—RES JUDICATA—EXTENT OF RULE.—The rule of res judicata extends to every proposition assumed or decided by a court, upon which the final conclusion is based, and this includes the status of a person where that is the subject upon which the judgment acts. (*State v. McDonald*, 878.)

9. JUDGMENTS—RES JUDICATA.—If, in an action to recover the contract price of services rendered, defendant recovers judgment on the ground that the contract has not been completed, such judgment is not a bar to a second action to recover the reasonable value of the same services. To constitute res judicata, the former suit must be founded on the same cause of action as the latter. (*Rossman v. Tileny*, 247.)

10. CRIMINAL LAW—ARREST OF JUDGMENT.—A defect in an indictment that appears only by the aid of testimony cannot be made the subject of a motion in arrest of the judgment. (*State v. Washington*, 141.)

11. JUDGMENTS—SETTING ASIDE.—A court has full authority to set aside its orders and judgments for good cause shown within a reasonable time after the party affected thereby shall have knowledge or notice thereof. (*Rustad v. Bishop*, 282.)

12. JUDGMENTS—RELIEF IN EQUITY FROM.—EQUITY CANNOT ENJOIN a judgment and grant a new trial because of a false return of service of process unless it appears that if a new

trial is granted a good defense will produce a different result. (McClung v. McWhorter, 785.)

18. JUDGMENTS—RELIEF IN EQUITY FOR FALSE RETURN OF PROCESS.—An officer's return on judicial process cannot be contradicted by parties or privies in its statement of such facts as the law requires him to state to make the return good, unless it is shown that the party is in collusion with the officer to make a false return. In the absence of such proof relief cannot be obtained in equity. (McClung v. McWhorter, 785.)

See Constitutional Law, 7; Deeds, 13; Executions, 1; Homesteads, 2; Limitation of Actions, 2; Setoff; Stare Decisis.

JUDICIAL NOTICE.

See Evidence, 2.

JURISDICTION.

JURISDICTION — ACTION BY ONE NONRESIDENT AGAINST ANOTHER—PROPERTY WITHIN THE STATE.—A circuit court has jurisdiction of an action by one nonresident against another, personally served with process, and in which the latter's real property within the county is attached, though the action is based on a contract foreign to the state, where the statute permits a creditor to proceed by attachment against his nonresident debtor in the circuit court of any county in which property of the latter may be found. (State Bank of Eldorado v. Maxson, 196.)

See Constitutional Law, 9.

JURY.

See Trial.

JUSTICES' COURTS.

See Trial, 4-6.

LABELS.

See Constitutional Law, 14.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—DEFINITIONS.—RENT is a comprehensive term embracing the compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof. (Whithed v. St. Anthony etc. Co., 562.)

2. LANDLORD AND TENANT—LEASE.—A contract under which one is given exclusive possession of land for a stated length of time, and covenants not to commit waste or to sublet the premises, the owner reserving in himself title and possession to a specific portion of the crop which shall be raised, constitutes a lease. (Whithed v. St. Anthony etc. Co., 562.)

3. LANDLORD AND TENANT—RENT NOT APPORTIONED. Where rent is payable at stated periods, as quarterly or yearly, it will not be apportioned, in the absence of an express reservation, and a purchaser of the property before the rent falls due is entitled to the whole thereof. (Whithed v. St. Anthony etc. Co., 562.)

LARCENY.

LARCENY—ADVICE OF COUNSEL AS A DEFENSE.—In a prosecution for larceny, where the defendant claims that he took the property under the advice of counsel, believing it to belong to another person than the complaining witness, it is not necessary that the advice of counsel, to be available as a defense, should have been given upon a statement of "all the facts" known to the defendant. The advice of counsel has no significance, in such a prosecution, except as a circumstance bearing on the defendant's good faith. (*People v. Slayton*, 211.)

LAW.

LAW—HARDSHIP IN SPECIAL CASES.—The settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases. (*State ex rel Helena Water Works Co. v. Helena*, 453.)

LEASE.

See Landlord and Tenant.

LIENS.

LIENS UPON LOGS, TIMBER, ETC.—HIRE OF HORSES NOT USED BY THE CLAIMANT OR HIS AGENT.—Under a statute giving a lien to "any person" performing labor or services upon logs, timber, etc., such person may claim a lien for labor or services performed by himself, or by his agent or servant, including their value as enhanced by the use of teams; but the statute cannot be so extended as to allow a lien for the hire of horses not used by the claimant himself, or by some person as his agent or servant, although they were rented for the express purpose of being used in such work. (*Edwards v. H. B. Waite Lumber Co.*, 884.)

See Mechanics' Liens.

LIMITATION OF ACTIONS.

1. STATUTE OF LIMITATIONS—RETROACTIVE EFFECT—ACTION ON JUDGMENTS.—Statutes of limitations apply to all cases thereafter brought, irrespective of when the cause of action arose, subject to the rule that they cannot be used to cut off causes of action without leaving reasonable time within which to assert them. Hence, a statute fixing the time within which actions must be brought applies to judgments rendered prior to its enactment, and it operates on prior causes of action not merely from the time of its enactment, but the time which has already run constitutes a part of the time prescribed by the statute. (*Osborne v. Lindstrom*, 516.)

2. STATUTE OF LIMITATIONS—SUIT ON JUDGMENT—LEAVE OF COURT.—The commencement of an action upon a judgment is not stayed by order of court, so as to prevent the running of the statute of limitations, merely because during a certain period the judgment creditor is required to obtain leave of court in order to bring suit thereon. (*Osborne v. Lindstrom*, 516.)

3. STATUTE OF LIMITATIONS—FIXING TIME WITHIN WHICH EXISTING ACTIONS MAY BE BROUGHT.—Where a limitation period for bringing actions is shortened, the legislature must fix a time within which actions may be brought on existing causes of action, and while it need not fix an exact time, the time it does fix must be reasonable. When the legislature makes the time so short that the right to sue is practically denied, courts will

declare such time unreasonable, but they cannot go further and fix a different time, neither can they, if the legislature fails to fix any time supply this legislative lapse. (*Osborne v. Lindstrom*, 516.)

4. **STATUTE OF LIMITATIONS—SUITS ON EXISTING ACTIONS—FIXING REASONABLE TIME.**—A statute of limitations with a provision that it shall not go into effect until a subsequent date is, in legal contemplation, a statute which takes effect at once; with a provision that suits may be brought upon existing causes of action until a specified subsequent date; and if the time between the passage of the act and its taking effect allows a reasonable period within which to bring actions, the statute is constitutional (*Osborne v. Lindstrom*, 516.)

5. **STATUTE OF LIMITATIONS—TIME WITHIN WHICH ACTIONS MUST BE BROUGHT—UNCERTAINTY AS AFFECTING REASONABLENESS.**—The time within which suits must be brought on existing causes of action may be uncertain by reason of the happening of a subsequent event, yet the statute is valid if such event cannot happen until the expiration of a reasonable time. (*Osborne v. Lindstrom*, 516.)

6. **LIMITATION OF ACTION ON BANK CHECK.**—A check on a bank payable on demand is a "simple contract in writing," and the period of limitation in which suit may be instituted thereon is the period prescribed by statute on such contracts, which begins to run from the presentation of the check for payment and refusal to pay, unless such presentation is excused in law. (*Haynes v. Wesley*, 72.)

7. **LIMITATION OF ACTION ON BANK CHECK—NO FUNDS IN BANK.**—Generally, the drawer of a check is not bound until payment is demanded and refused, but presentation for payment is not necessary when the drawer of the check at the time of its delivery has no funds to his credit in the bank on which it is drawn, and, in the latter event, the statute of limitations begins to run from the date of the check. (*Haynes v. Wesley*, 72.)

8. **LIMITATIONS OF ACTIONS—PLEADING.**—Under a statute which forbids the allowance of a claim against an estate which is shown to be barred by the statute of limitations, it is not necessary to plead the statute to such a claim. (*Martin v. Martin*, 895.)

9. **STATUTE OF LIMITATIONS—DEMURRER.**—Under a statute authorizing the defense of the statute of limitations to be interposed by demurrer, upon condition that it point out the statute relied upon, the demurrer is insufficient, unless the defendant specifies the particular section of the statute, or subdivision thereof, upon which he relies. (*Whereatt v. Worth*, 899.)

10. **STATUTE OF LIMITATIONS—DISHONORABLE DEFENSE—INCONSISTENT IDEAS.**—The idea that the defense of the statute of limitations is a vested right, entitled to constitutional protection, is not consistent with the notion that it is unconscionable and not to be favored by the courts, but a proper exercise of judicial discretion in refusing the defense will not be avoided. (*Whereatt v. Worth*, 899.)

11. **STATUTE OF LIMITATIONS—AMENDMENTS SETTING UP.**—A court has the same discretionary power to permit an amendment to a pleading, setting up the statute of limitations, as to permit any other defense to be pleaded; and it may, in the exercise of its discretionary power, and upon that ground alone, refuse to permit it in all cases where its availability depends upon judicial favor. (*Whereatt v. Worth*, 899.)

12. STATUTE OF LIMITATIONS—AMENDMENTS SETTING UP—REFUSAL OF, WHEN NOT ERROR.—A court does not err in refusing to permit a demurrer, interposing the defense of the statute of limitations, to be amended so as to cure an excusable mistake, by referring to the section of the statute relied upon, where the availability of the defense of the statute of limitations depends upon judicial favor. (*Whereatt v. Worth*, 899.)

See Prescription.

LOGS.

See Liens.

LOTTERIES.

1. LOTTERIES—NICKEL IN SLOT MACHINES.—A person who maintains a "nickel in the slot" machine displaying a "poker hand," by which a person depositing a nickel and playing the machine is entitled to a cigar or a package of chewing-gum, each valued at five cents, and in addition thereto, a prize according to the "hand" displayed, violates a statute providing that no person "shall keep, maintain, employ, or carry on any lottery, or other scheme or device for the hazarding of any money or valuable thing." (*Meyer v. State*, 17.)

2. LOTTERIES—NICKEL IN SLOT MACHINES.—Any scheme or device, such as a "nickel in the slot machine," operated by a person, by which one participating therein may either lose the money invested, or get more than his money's worth, the operator retaining the money so lost, is a scheme or device for the hazarding of money, within the meaning of a statute prohibiting such hazard. (*Meyer v. State*, 17.)

MAIL BAGS.

See Railroads, 13-16.

MANDAMUS.

1. MANDAMUS.—REFUSAL TO TAKE JURISDICTION, or, after having acquired jurisdiction, refusal to proceed in its regular exercise, or the erroneous determination of a preliminary question of law, upon which the court refused to examine the merits, will be corrected by mandamus. (*Raleigh v. First Judicial Dist. Court*, 431.)

2. MANDAMUS—TO COMPEL COURT TO TAKE JURISDICTION OF WILL CONTEST.—If a court erroneously strikes from the files a contest of a will, on the ground that it was inadmissible because of a previous contest, which had been dismissed for a failure to state a ground of contest, a writ of mandamus will issue to compel such court to take jurisdiction of the contest, there being no appeal from the order striking the grounds of contest from the files, and the contestant having no adequate legal remedy. (*Raleigh v. First Judicial Dist. Court*, 431.)

3. MANDAMUS—DEMAND PRECEDING APPLICATION.—It is indispensable to the granting of a writ of mandamus that there should be a prior express and specific demand by the relator of what he seeks; and it should also be shown that the defendant has it in his power to perform the act. (*State v. Associated Press*, 368.)

4. **MANDAMUS IS NOT A REMEDY TO COMPEL THE MAKING OF A CONTRACT**, and will not issue for such a purpose, particularly where the performance of the contract involves, and requires for a long time, the exercise of judgment, continuous supervision, special experience, and business discretion, as where a publishing company seeks a daily news service to be rendered to it by a news gathering association. (*State v. Associated Press*, 368.)

5. **MANDAMUS.—A COURT WILL NOT AWARD A DISCRETIONARY WRIT of mandamus** for the mere purpose of determining an empty and barren technical right in behalf of a petitioner. (*State v. Associated Press*, 368.)

MARRIAGE AND DIVORCE.

1. **MARRIAGE AND DIVORCE—BREACH OF PROMISE—DISEASE.**—If a man develops a disease, rendering it unsafe or improper to marry, without intervening fault on his part, between the date of the contract to marry and the date appointed for the marriage, he is entitled to have the ceremony postponed until the result of the disease is known or a cure can be effected. (*Trammell v. Vaughn*, 302.)

2. **MARRIAGE AND DIVORCE—BREACH OF PROMISE—VENEREAL DISEASE—DAMAGES.**—If a man, knowing that he has a contagious venereal disease, enters into a contract to marry, the woman is entitled to refuse to marry him, and to treat his condition as a breach of the contract, and as an aggravation of the damages she is entitled to recover therefor. (*Trammell v. Vaughn*, 302.)

3. **MARRIAGE AND DIVORCE—BREACH OF CONTRACT.**—The state is a third party to every marriage contract and has a direct interest therein and in the breach thereof. (*Trammell v. Vaughn*, 302.)

4. **MARRIAGE AND DIVORCE.—EVERY CONTRACT OF MARRIAGE** implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. (*Trammell v. Vaughn*, 302.)

5. **MARRIAGE AND DIVORCE—VENEREAL DISEASE AS EXCUSE FOR BREACH OF PROMISE TO MARRY.**—If a man under promise to marry is afflicted with a contagious venereal disease, he is entitled to demand that the marriage be postponed until he is cured, regardless of whether the woman consents to such postponement or not; and if he becomes afflicted with such disease without any fault or negligence on his part after entering into the contract to marry, he is not liable for damages, and the contract is broken by force of law. (*Trammell v. Vaughn*, 302.)

6. **MARRIAGE AND DIVORCE—VENEREAL DISEASE AS AFFECTING BREACH OF PROMISE TO MARRY.**—If a man under contract to marry is afflicted with a venereal disease of a temporary character that can be easily cured, he is entitled to a postponement of the marriage until he is cured; and if such disease is of a permanent character the contract to marry is annulled, regardless of the consent or nonconsent of the woman. (*Trammell v. Vaughn*, 302.)

7. **MARRIAGE AND DIVORCE—BREACH OF PROMISE—DAMAGES.**—A woman is not entitled to recover damages for a breach of promise to marry growing out of her wrongful act in breaking her contract to marry a third person, even if the breach

of the latter contract is induced by the man she sues. (*Trammell v. Vaughn*, 302.)

8. MARRIAGE AND DIVORCE—BREACH OF PROMISE—DAMAGES.—Compensatory damages only, and not punitive or exemplary damages, as such, can be recovered for a breach of a contract of marriage. (*Trammell v. Vaughn*, 302.)

9. MARRIAGE AND DIVORCE—BREACH OF PROMISE—AGGRAVATION OF DAMAGES.—Statements made by a man that he induced a woman to promise to marry him, set the day, obtained a license, and then refused to marry, only to show others that he could marry her, may be considered in aggravation of the damages to which she is entitled for the breach of the promise to marry. (*Trammell v. Vaughn*, 302.)

10. MARRIAGE AND DIVORCE—BREACH OF PROMISE—TIME OF BRINGING ACTION.—An action for a breach of a promise to marry is not prematurely brought, if at the time it is brought the man, though afflicted with a temporary and curable venereal disease, has declared that he does not intend to keep his promise to marry at any time. (*Trammell v. Vaughn*, 302.)

11. DIVORCE—CRUEL AND INHUMAN TREATMENT.—The fact that a husband is of a sullen, morose, and fretful disposition, making him a very uncompanionable man with whom to live, does not constitute cruel and inhuman treatment practiced by other means than by acts of personal violence, within the meaning of a statute permitting divorce for such cause, where the only intimation in the evidence that it was unsafe for the wife to live with her husband was that she brooded over her troubles until she became very nervous, and that she took medicine for such nervousness, but that otherwise her health was good. (*Johnson v. Johnson*, 836.)

12. DIVORCE—COSTS AGAINST WIFE.—In a divorce proceeding, where the husband prevails against his wife, she having separate property or a separate income, costs may be awarded against her. (*Johnson v. Johnson*, 836.)

See Contracts, 1-3.

MASTER AND SERVANT.

1. MASTER AND SERVANT—MISCONDUCT OF SERVANT—CONDONATION OF.—If a master retains a servant in his employment until the end of the term, notwithstanding acts of misconduct on the part of such servant for which he might have been discharged, but was not, such acts must be considered as having been waived or condoned by the master, and he is liable for the compensation which he has agreed to pay for the term of employment. (*Burdine v. Burdine*, 741.)

2. MASTER AND SERVANT—DISREGARD OF RULES AND REGULATIONS—ARROGATION.—If rules and regulations established by the master are habitually disobeyed, with the knowledge or express consent of the master, or have been disregarded without his express consent in such a manner, and for such a length of time, as to raise a presumption that the master must have become aware of such habitual disregard, and approved it, such rules and regulations must be regarded as abrogated. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

3. MASTER AND SERVANT—ASSUMPTION OF RISK.—The rule as to the assumption of risk by a servant is, that the master is bound to observe all the care which prudence and the exigencies

of the situation require in providing the servant with machinery or other instrumentalities adequately safe for his use. And an instruction that the servant "did not undertake to incur risks arising from defective machinery, or other instruments with which he is at work, his contract implied that in regard to these matters the master would make adequate provision that no unnecessary danger should ensue to him," is erroneous as incorrectly stating the rule. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

4. MASTER AND SERVANT—LATENT DANGER—WARNING—MASTER'S DUTY.—Whenever there is any hidden, unusual, or latent danger connected with any work the law imposes a duty on the employer of informing the employé of the danger. It is not enough to tell him that the work is dangerous, but the particular danger must be pointed out and explained. (*Ribich v. Lake Superior Smelting Co.*, 215.)

5. MASTER AND SERVANT—DANGER OF EXPLOSION—WARNING—MASTER'S DUTY.—When a man is employed at smelting works to dump pots of molten copper mixed with slag at a place where some ice has been melted, it is the duty of the employer to warn the employé as to the dangerous nature of the work, to instruct him that the molten copper and slag is liable to explode on coming in contact with water, and to explain to him the nature, force, and probable effect of such an explosion. (*Ribich v. Lake Superior Smelting Co.*, 215.)

See Railroads, 6, 7.

MAXIMS.

Hardship of law in special cases. (*State ex rel. Helena Water Works Co. v. Helena*, 453.)

MECHANICS' LIENS.

1. MECHANIC'S LIEN—OIL FOR MINING MACHINERY.—Under a statute providing that every person furnishing material for any machinery, fixture, or building has a lien therefor, illuminating oil, mica grease, lubricating oil, and gasoline for fuel, used in a mining plant, are not lienable, since each is consumed in use, and does not add to the value nor become a part of the property on which it is used. (*Holter Hardware Co. v. Ontario Min. Co.*, 421.)

2. MECHANIC'S LIEN—WHEN ATTACHES—COMMENCEMENT OF WORK.—Under the statutes of Wisconsin, the right to a lien for work done in the construction of a building is not dependent upon whether a building is actually constructed, but upon whether such construction is commenced. If construction is commenced and lienable work is done in aid thereof, the right of lien thereby becomes perfect and cannot thereafter be defeated by any act of the proprietor. (*Fitzgerald v. Walsh*, 824.)

3. MECHANIC'S LIEN—ARCHITECT'S PLANS—COMMENCEMENT OF WORK.—Where the construction of a building is actually commenced according to plans and specifications furnished by an architect and accepted, the architect has a right to a lien for his plans, although the use of them is abandoned before anything is done other than the commencement of the excavation for the basement. (*Fitzgerald v. Walsh*, 824.)

4. MECHANIC'S LIEN—COMMENCEMENT OF WORK—EXCAVATION.—The commencement of the excavation for the basement of a building is the commencement of the building within the

meaning of a mechanic's lien statute, and there is a building within the meaning of such statute, and lienable claims will attach to the property. (*Fitzgerald v. Walsh*, 824.)

MINES AND MINING.

See Cotenancy, 1; Partnership.

MONOPOLIES.

1. **MONOPOLIES.—A COURT WILL NOT ADD ONE MORE MONOPOLIST** to a monopolistic organization, because that would not lessen its monopolistic features or abate its vicious tendencies. (*State v. Associated Press*, 368.)

2. **MONOPOLIES—ASSOCIATED PRESS COMPANIES ARE NOT.**—There is no basis laid for the fact or the charge of a monopoly unless there is "property" to be "affected with a public interest." Hence, the business of the Associated Press, in gathering and disseminating news, is not a monopoly, for the business is one of mere personal service—an occupation. (*State v. Associated Press*, 368.)

3. **THE ANTI-TRUST LAWS** of Illinois are not of force in Missouri, and those of the United States must be enforced in another forum. The anti-trust laws of Missouri do not apply to the business of the Associated Press. (*State v. Associated Press*, 368.)

MORTGAGES.

1. **CONVEYANCES—ASSIGNMENT OF MORTGAGE—FAILURE TO RECORD.**—An assignment of a real estate mortgage is a conveyance which should be placed on record, and a failure to record it renders it void as to subsequent purchasers or encumbrancers of the mortgaged premises in good faith and for a valuable consideration whose conveyances are first recorded. (*Henniges v. Paschke*, 588.)

2. **MORTGAGES—ASSIGNMENT OF—FAILURE TO RECORD—BONA FIDE PURCHASER—MAXIM.**—When one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong. Hence, a purchaser of real property for value who acted entirely in good faith, relying on the record title in making the purchase, is protected as against a bona fide purchaser of promissory notes secured by a mortgage on the same property, who has neglected to take and place on record an assignment of the same. (*Henniges v. Paschke*, 588.)

3. **MORTGAGES + FORECLOSURE SALE—PURCHASER'S RIGHT TO RENTS—CROPS.**—A purchaser of land at a foreclosure sale is substituted to the rights of the owner, and is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. Hence, where farm lands, which are being operated under a contract whereby the title to and possession of a stated portion of all the grain grown on the land are reserved in the owner as rent, are sold under foreclosure, the purchaser succeeds to the owner's rights, and is entitled to receive his share of the grain which falls due during the redemption period, and may invoke the same remedies the owner might have had to protect and enforce his interests in and under the contract. (*Whithed v. St. Anthony etc. Co.*, 562.)

4. **MORTGAGES—FORECLOSURE—RIGHT OF PURCHASER.** A foreclosure sale operates as a conveyance to the purchaser

at such sale of the entire beneficial interest of the owner, save the right of redemption, and the bare right of possession during the redemption period. (*Whithed v. St. Anthony etc. Co.*, 562.)

See Chattel Mortgage; Executors and Administrators, 8-11; Homesteads, 4, 5; Judgments, 4; Waters and Watercourses, 19, 20.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—ACTS ULTRA VIRES—ENFORCEMENT OF ILLEGAL LOAN.—If the officers of a city unlawfully loan city funds to a private person and take a mortgage as security therefor, the city is not estopped, although the act is ultra vires, from enforcing collection of the debt by foreclosure of such mortgage. (*Fergus Falls v. Fergus Falls Hotel Co.*, 249.)

2. MUNICIPAL CORPORATIONS — MORTGAGE ULTRA VIRES—PURCHASERS WITH NOTICE.—If the officers of a municipality unlawfully loan city funds to a private person and take a mortgage as security therefor, subsequent purchasers of the mortgaged property, with notice of the mortgage, cannot, in an action by the city to foreclose such mortgage, take advantage of the fact that the act of the city officers was ultra vires. (*Fergus Falls v. Fergus Falls Hotel Co.*, 249.)

3. MUNICIPAL CORPORATIONS — LIABILITY — BARRIERS ON HIGHWAY.—If a highway, within the limits of a municipality, is in good condition and wide enough to drive upon with safety, and a horse, while being driven thereon, leaves the highway through any cause for which the municipality is not answerable, and an accident occurs, resulting in injury to the driver, the municipality is not liable therefor on the ground that it failed to maintain barriers at the place of the accident. (*Bell v. Wayne*, 204.)

4. MUNICIPAL CORPORATIONS — LIABILITY — ACCIDENTS ON HIGHWAY—HORSES BEYOND CONTROL—PROXIMATE CAUSE.—If a horse, while being driven on a highway, within the limits of a municipality, becomes so frightened at some boys in a plum tree near the highway and near the approach of a bridge thereon that, under proper management, he cannot be kept within a good roadbed, seventeen feet wide, he is "beyond control," and if an accident occurs resulting in injury to the driver, the municipality is not answerable therefor, as the fright and not the absence of barriers was, as a matter of law, the cause of the accident. (*Bell v. Wayne*, 204.)

5. MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT—WATER SUPPLY.—A contract for a water supply entered into by a city which has already exceeded the constitutional limit of indebtedness, where a municipal ordinance appropriates out of the city's yearly revenues sufficient money to pay for the water, and orders the levying of annual taxes sufficient to meet the appropriation, is a contract within the prohibition of the constitution, where such prohibition is against becoming indebted "in any manner or for any purpose" when a given amount of indebtedness has been previously incurred. (*State ex rel. Helena Water Works Co. v. Helena*, 453.)

6. MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT—LIABILITIES PAYABLE OUT OF CURRENT REVENUES.—A debt payable in the future or upon a contingency differs from a debt payable presently only in the manner by which it was incurred. Therefore, under a constitutional provision which prohibits a city from becoming indebted beyond a certain amount, "in any manner

or for any purpose." There is no distinction between an indebtedness for current expenses, payable out of current revenues, and one for the payment of which no provision has been made, and for which the city is generally liable; both are within the constitutional prohibition. (State ex rel. Helena Water-Works Co. v. Helena, 453.)

7. MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT—SPECIAL TAX—WATER SUPPLY.—When a municipality has exceeded the constitutional limit of indebtedness, a contract for water supply, under which the city is liable generally, is the bearing of an indebtedness within the meaning of the constitution, but such a contract does not create an indebtedness when the city is authorized by law to levy a special tax expressly for the payment of such contract liability, since in such case the liability is special and limited to the amount of the tax levy expressly authorized (State ex rel. Helena Water Works Co. v. Helena, 453.)

8. MUNICIPAL INDEBTEDNESS—AGGREGATE OF ALL YEARLY PAYMENTS.—The contract of a municipal corporation for a useful and necessary thing, such as water, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments, since the debt of each year comes into existence only when the annual compensation has been earned. (State ex rel. Helena Water Works Co. v. Helena, 453.)

9. MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMIT—LIABILITY OF CITY—APPROPRIATION TO PAY FOR WATER SUPPLY.—Under a contract for the supply of water, and because incurring an indebtedness in excess of the limit allowed by the constitution, any obligation flowing therefrom is void ab initio and no liability to pay for water furnished under such contract is imposed upon the city by the fact that the city council has appropriated a particular sum to pay therefor. (State ex rel. Helena Water Works Co. v. Helena, 453.)

10. MUNICIPAL INDEBTEDNESS—GENERAL—ACTION TO RECOVER—MANDAMUS.—Where the liability of a city under a contract is general, and there is no limit to the amount for which the city can become indebted, a failure on the part of the city to meet its obligations under the contract as they fall due will authorize the recovery of a general judgment against it, and mandamus will issue for the levy and collection of a tax to pay such judgment. (State ex rel. Helena Water Works Co. v. Helena, 453.)

11. MUNICIPAL INDEBTEDNESS—LIMIT—NOTICE OF DUTY OF PRIVATE CONTRACTOR.—Where the powers of a city to incur indebtedness are limited, it is the duty of one who contracts with such city, whereby a debt is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness is in excess of the constitutional limitation (State ex rel. Helena Water Works Co. v. Helena, 453.)

See Constitutional Law, 15.

NATURALIZATION.

1. NATURALIZATION—EVIDENCE OF—ADMISSIBILITY.—In an action in one state to try title to an office, the record of the defendant's late naturalization proceedings in another state is admissible in evidence, not only as an admission against interest but as to a former adjudication of a material fact, where the issue is whether or not the defendant is an elector of the former state (State v. McDonald, 878.)

2. NATURALIZATION — CONCLUSIVENESS OF.—Judgments of naturalization fix the status of the naturalized person irrevocably, and necessarily include all the facts upon which they are based. The result is binding upon the world, not only as to the ultimate fact established, but the facts upon which it rests. (*State v. McDonald*, 878.)

3. NATURALIZATION—RES JUDICATA.—If a court, on an application in another state for citizenship, adjudges that the applicant was a resident of that state for one year immediately preceding the application, this adjudication is conclusive of the same question in this state, when its truth is vital to a question here, whether the federal statute calls for that particular year's residence or not. (*State v. McDonald*, 878.)

NEGLIGENCE.

1. NEGLIGENCE—FIREWORKS ON PRIVATE PROPERTY —LIABILITY OF OWNER—INDEPENDENT CONTRACTOR.—The owner of a private park, who invites the public thereto to view an exhibition of fireworks, is not relieved from all responsibility for the safety of persons in attendance because the exhibition is given by an independent contractor, such owner being chargeable with the duty of using reasonable care to see that the premises are kept in a safe condition for the use of his guests, and in selecting, as the person to conduct the exhibition, one who is skilled in the manufacturing of fireworks and in conducting exhibitions thereof. (*Sebeck v. Plattdeutsche Volkfest Verein*, 512.)

2. NEGLIGENCE—MISUSE OF PAPER BY COUNSEL—WRONGFUL CONSTRUCTION—NONREVERSIBLE ERROR.—In an action for personal injuries the defendant is not injured by the admission in evidence of a paper containing no admission of liability on his part, such as a notice to another, whose negligence caused the injuries, tendering him control of the suit, and the improper use of such paper by counsel in argument, who wrongfully construe it as an admission of the defendant's liability, is not reversible error where the judge cautions the jury not to so interpret it. (*Shaw v. Chicago etc. Ry. Co.*, 230.)

3. NEGLIGENCE.—COMPARATIVE NEGLIGENCE is not a part of the law of Wisconsin. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS A BAR.—Negligence, in the sense of a want of ordinary care, however slight, contributing to an injury, prevents a recovery therefor, where the act of the defendant was not willful or malicious, however great or gross may have been his negligence. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

5. NEGLIGENCE.—WILLFUL, MALICIOUS, OR WANTON CONDUCT is properly beyond the scope of the term "negligence," as it is ordinarily understood, though the term "gross negligence" has sometimes been extended to include it, thus leading to some misunderstanding as to what the law really is. Such conduct has in it no element of inadvertence, which is a necessary element of negligence. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

6. NEGLIGENCE—INJURY TO NEGLIGENT TRESPASSER—RECOVERY.—The fact that a person was a trespasser at the instant of receiving a willful injury from the person upon whose property he was trespassing will not preclude him from recovering damages for such injury, though he was himself negligent. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

7. CONTRIBUTORY NEGLIGENCE OF DRUNKEN MAN.—Where one, by reason of his own voluntary intoxication, exposes himself to danger, and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries. (*Bageard v. Consolidated Traction Co.*, 498.)

See New Trial; Railroads.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—NOMINAL PAYEE—RATIFICATION.—If a note secured by mortgage is made to a nominal payee who has no interest in nor knowledge of it, his indorsement thereof and the assignment of the mortgage to him need not be shown in order to introduce the mortgage in evidence in an action of replevin by a bona fide purchaser of such note and mortgage, nor need the latter show that such nominal payee ratified the unauthorized use of his name, in order to sustain his action. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

2. NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—PROOF OF INDORSEMENT.—The bona fide purchaser of a note from the maker, or from an indorsee of his with instructions to sell it and remit the proceeds, is not compelled in replevin for livestock mortgaged to secure such note to prove the genuineness of the maker's indorsement when the latter holds possession of such stock. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

3. NEGOTIABLE INSTRUMENTS—PLEADING—ESTOPPEL. In replevin for livestock mortgaged to secure a note held by a bona fide purchaser, the latter is not required to plead facts estopping the maker of the note from showing that it was not indorsed by the nominal payee, provided the actual maker of the note owns, and is in possession of, the stock sued for. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

4. NEGOTIABLE INSTRUMENTS—NOMINAL PAYEE—INDORSEMENT.—If a person makes a note payable to a real person, though a nominal payee, who has no interest therein nor knowledge thereof, and the maker then indorses the name of such payee on the note and puts it on the market, he cannot, as against a bona fide holder, question the genuineness of the signatures on the note when it left his hands. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

5. NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION.—If a note is indorsed for collection and sent to the place of payment, the power of the person receiving it is limited to collection, and he cannot sell or transfer the note. (*People's and Drivers' Bank v. Craig*, 639.)

6. NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION—PAYMENT BY VOLUNTEER.—If a note is indorsed for collection, and the person receiving it remits the amount thereof out of his own funds, such transaction is a payment and extinguishment of the note, and not a transfer thereof. (*People's and Drivers' Bank v. Craig*, 639.)

7. NEGOTIABLE INSTRUMENTS—INDORSEMENT FOR COLLECTION—PAYMENT.—If the person receiving a note indorsed for collection remits the amount thereof to the holder out of his own funds, with the assent of the maker, the latter may be held liable as for money paid to his use, or on the note as a reissued

note, but as to nonassenting makers there is no liability for such payment which extinguishes the note as to them. (*People's and Drivers' Bank v. Craig*, 639.)

8. **NEGOTIABLE INSTRUMENTS — INDORSEMENT FOR COLLECTION—PAYMENT BY VOLUNTEER—SUBROGATION.**—A person who receives a note indorsed for collection, and remits the amount thereof to the owner out of his own funds, without the assent of the maker, is a mere volunteer, and not entitled to subrogation. (*People's and Drivers' Bank v. Craig*, 639.)

See Agency, 2-4; Limitation of Actions, 6, 7.

NEW TRIAL.

1. **NEW TRIAL—DAMAGES FOR PERSONAL INJURIES.**—In an action for personal injuries, which were not only very painful but which caused permanent disfigurement to an eye and loss of its sight, a verdict for seven thousand dollars damages is not so grossly excessive as to require any interference. (*Shaw v. Chicago etc. Ry. Co.*, 230.)

2. **NEW TRIAL—DAMAGES FOR PERSONAL INJURIES—WHEN EXCESSIVE—REMITTING EXCESS.**—In an action by an employé against a smelting company for personal injuries caused by the explosion of a pot of molten copper mixed with slag, on coming in contact with water, and resulting in the loss of an eye and severe pain for several months, a verdict for fifteen thousand dollars is excessive where the employé is not wholly incapacitated for labor, and interest on the amount would produce an income greater than his earning capacity before the injury, although the sight of the other eye had been seriously impaired by another accident. Hence, a new trial should be awarded unless the plaintiff will remit from the verdict all in excess of ten thousand dollars. (*Riblich v. Lake Superior Smelting Co.*, 215.)

See Appeal, 9.

NUISANCE.

1. **NUISANCE—DEFINITION.**—Every unlawful use by a person of his own property in such a way as to cause injury to the property rights of another, producing material annoyance, inconvenience, discomfort, or hurt, and every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes an actionable nuisance. (*Metzger v. Hochrein*, 841.)

2. **NUISANCE—LAWFUL ACT WITH MALICIOUS MOTIVE.**—As a general rule, whatever a man may lawfully do on his own property under any circumstances he may do regardless of the motive for his conduct. (*Metzger v. Hochrein*, 841.)

3. **NUISANCE — MALICIOUS USE OF PROPERTY—DISAGREEABLE FENCE.**—Where no physical injury is done to adjoining property or its occupants, a person may use his own land as he sees fit, regardless of his motives, even if such use render the adjoining property less valuable and desirable for dwelling-house purposes. Hence, one who unreasonably and with malicious motives erects a high and unsightly fence on his own land, which injures the value of adjoining property by diminishing the beauty of its surroundings, shutting off its access to light, and cutting off its view of surrounding territory, does not render himself liable for the maintenance of a nuisance. (*Metzger v. Hochrein*, 841.)

OFFICERS.

PUBLIC OFFICERS—FORCIBLE RETENTION OF OFFICE—RIGHT TO SALARY.—One who forcibly and without legal title retains possession of a public office after his term expires, against the demand of his legally appointed successor, cannot recover from the public the salary attached to the office accruing during such illegal possession. (*Blore v. Board of Chosen Freeholders*, 495.)

See Constables; Trial.

OIL.

See Partition, 7.

PARENT AND CHILD.

See Criminal Law, 1.

PARTITION.

1. PARTITION—MISSOURI STATUTE—CONSTRUCTION OF—TITLE TO PROPERTY.—The rights and interests of parties in real estate are not declared or determined by the partition statute of Missouri. It simply provides a procedure whereby such rights and interests, as they exist under the general law, may be ascertained and finally determined, and partition be made accordingly. (*Whitsett v. Wamack*, 339.)

2. PARTITION—RELEASE TO COPARCENER AND HER HUSBAND—EFFECT OF LATTER'S DEED.—When three coparceners voluntarily partition their inheritance among themselves, by two of them executing a deed of release or quitclaim to the third and her husband, it conveys no title to the latter, and his grantee, by a subsequent deed, cannot, therefore, assert any title as against the wife's minor children, for the husband's deed conveyed only his curtesy. (*Whitsett v. Wamack*, 339.)

3. PARTITION—INTERLOCUTORY DECREE. EFFECT OF AS RES JUDICATA.—An interlocutory decree directing the partition of real property, and instructing the referees to assign to certain of the parties lands which they have mined, does not exonerate such parties from accounting for the proceeds of such mining. (*Cecil v. Clark*, 802.)

4. COTENANCY—PARTITION—IMPROVEMENTS.—AT COMMON LAW, and independent of statute, a cotenant cannot charge another with the value of improvements made upon the premises, unless they are made with the latter's consent. (*Gjerstadengen v. Hartzell*, 575.)

5. COTENANCY — PARTITION — IMPROVEMENTS. — IN EQUITY, in decreeing a partition of premises, improvements made by a cotenant may be taken into consideration, even when made without consent or promise of contribution, provided they are necessary, useful, substantial, and permanent, enhancing the value of the estate. (*Gjerstadengen v. Hartzell*, 575.)

6. COTENANCY—ALLOWANCE FOR IMPROVEMENTS.—In a suit to partition farm lands, a cotenant will not be allowed compensation for breaking and backsetting done by a remote grantor of such cotenant, where such improvements were made without the consent of the other cotenants, for the sole benefit of the person making them, that they were not necessary for the preservation of

the estate, and that the value of the improvements were more than offset by the value of the use and occupation which the person making the improvements enjoyed during the period of his exclusive possession. (*Gjerstadengen v. Hartzell*, 575.)

7. PARTITION OF OIL AND GAS.—Co-owners of oil and gas, not owning the surface of the land, have no right to partition except by sale and division of the proceeds, and a decree of partition as to such oil and gas separate from the surface by allotting it by sections of the surface, is void. (*Hall v. Vernon*, 791.)

PARTNERSHIP.

1. MINES AND MINING—PARTNERSHIP.—Cotenants or joint tenants of an oil lease who unite and co-operate in working the land leased, though without any express agreement, constitute a mining partnership. (*Childers v. Neely*, 777.)

2. MINES AND MINING—PARTNERSHIP—DISSOLUTION.—A mining partnership is not dissolved by the death or bankruptcy of a member, nor by the sale by him of his interest in the partnership. (*Childers v. Neely*, 777.)

3. MINING—PARTNERSHIP—CONTROL.—Members of a mining partnership holding the major portion of the property have power to do what is necessary and proper for carrying on the business for the benefit of all concerned, in case all of the members of the partnership cannot agree. (*Childers v. Neely*, 777.)

4. MINING—PARTNERSHIP—LOSS FROM BAD FAITH OR NEGLECT—INDIVIDUAL LIABILITY.—Losses from neglect of duty, bad faith, or breach of duty by a member of a mining partnership, or breach of the partnership agreement, or improper diversion of the property of the partnership to purposes foreign to its business, may be charged to him individually in an accounting. (*Childers v. Neely*, 777.)

5. MINING—PARTNERSHIP—LIEN FOR ADVANCES—DIVISION OF PROPERTY.—Members of a mining partnership have a lien on the partnership property for advances made, or balances due, after the payment of debts. Such lien is on partnership property only while distinctly such, and if there is or has been a separation or division of such property, or part of it, the lien is lost. (*Childers v. Neely*, 777.)

6. MINING—PARTNERSHIP—DISSOLUTION.—If a bill is filed by a member of a mining partnership for an accounting and dissolution of the partnership, and sufficient cause for a dissolution is shown, the prayer of the bill should be granted. It is error to enter a decree allowing the partnership to continue business making only a partial account, leaving the assets and business wholly in the possession and control of one member, excluding the other and charging him with a balance on such partial account and leaving other assets untouched by such account. (*Childers v. Neely*, 777.)

7. PARTNERSHIP—ACCOUNT AND DISSOLUTION.—A bill for an accounting between partners which does not also seek a dissolution of the partnership cannot be maintained. (*Childers v. Neely*, 777.)

PERCOLATING WATERS.

See Waters and Watercourses, 1-4.

PLEADING.

See Constitutional Law, 8; Limitation of Actions, 8-12.

POLICE POWER.

1. POLICE POWER—GOVERNMENTAL CONTROL OF PROPERTY OR BUSINESS—WHEN PERMISSIBLE.—It is only on the basis of the exercise of the police power, and that exercise based on certain exceptional conditions, that a person who has dedicated his property to a public use, or who is engaged in some quasi public business and enjoying some privilege or immunity incident to such business, can be brought under governmental control in relation to such property or business and its regulation. (*State v. Associated Press*, 368.)

2. POLICE POWER—COMPENSATION FOR USE OF PROPERTY—INFLUENCE OF.—REGULATIONS which the state, in the exercise of its police power, authorizes with respect to the use of property, are entirely independent of any question of compensation for such use. The question of compensation has no influence in establishing them. (*State v. Associated Press*, 368.)

3. STATES—REGULATION OF BUSINESS BY ASSOCIATED PRESS—MONOPOLY.—The mere fact that incorporation has been granted to a company, such as the Associated Press, to pursue the lawful calling of gathering and disseminating news, does not, and cannot, of itself give the state a right to regulate what before incorporation was but a natural right, especially where the company has no monopoly and has been granted no special or exclusive rights or privileges by the state. (*State v. Associated Press*, 368.)

4. THE LEGISLATURE MAY DECLARE THAT A BUSINESS has become impressed with a public use, but the courts cannot do so. (*State v. Associated Press*, 368.)

PRESCRIPTION.

1. PRESCRIPTION—CUSTOM.—A PROFITABLE RIGHT in the land of another cannot be acquired by custom, but only by prescription. (*Albright v. Cortright*, 504.)

2. PRESCRIPTION—RIGHTS ACQUIRED BY PUBLIC.—Prescription is a personal right belonging to one or a few persons by particular designation; hence one cannot claim, merely as one of the public, a profitable right in the land of another by prescription, since the public cannot prescribe. (*Albright v. Cortright*, 504.)

See Fishing, 1.

RAILROADS.

1. RAILROADS—RECOVERY FOR LAND TAKEN—REMOVAL OF TRACKS.—Where the roadbed of a railroad company which has been constructed over the land of another has remained there for a period of five years without objection, the owner meanwhile selling his premises with that burden upon them, the permanent right of occupation is transferred from the owner to the company, and the right of the land owner to obtain compensation for his injury is irrevocable, and cannot be defeated by the company completely removing its roadbed and embankment from the premises. (*Babcock v. Chicago etc. Ry. Co.*, 845.)

2. PLEADING—DESCRIPTION OF PROPERTY—JURISDICTION.—In a suit by a land owner to recover compensation for land taken by a railroad company for the construction of its roadbed, allegations in the petition are liberally construed so far as consistent with reasonable certainty of information, and a petition is sufficient

to confer jurisdiction upon the court to ascertain what land within the limits of that described has in fact been occupied by the railroad company, where it alleges that the track was constructed over an ascertainable parcel of land belonging to the land owner, to which is annexed a plat whereon are specified courses and distances, with reference to the duly defined and recorded lot lines. (*Babcock v. Chicago etc. Ry. Co.*, 845.)

3. PLEADING — PETITION—EMINENT DOMAIN—NECESSITY OF TAKING LAND.—In a suit by a land owner to recover compensation for land taken by a railroad company for the use of its tracks, the plaintiff need not allege the necessity of the taking as is required when condemnation proceedings are initiated by the railroad company. (*Babcock v. Chicago etc. Ry. Co.*, 845.)

4. COMMON CARRIERS—LIABILITY FOR CARS OWNED BY ANOTHER.—A railway company cannot escape liability for its failure to provide cars reasonably safe and fit for the conveyance of the particular class of goods it undertakes to carry, by alleging that the cars used for the purpose of its own transit were the property of another, who undertook to insure the fitness of such cars for the purposes of the transportation. In such case the owner of the cars is the agent or servant of the carrying railway company. (*New York etc. R. R. Co. v. Cromwell*, 722.)

5. NEGLIGENCE—EVIDENCE.—In an action to recover for personal injury to a railroad engineer caused by the explosion of the boiler of a locomotive in his charge, alleged to have been due to defects known to the company but unknown to such engineer, and the question of negligence depending upon the time taken to run from one station to another, between which the explosion occurred, old timetables of the company not in effect at the time of the accident are not admissible in evidence to show that no unusual danger was incurred by violating the requirements of the existing time card, unless it is shown that the conditions were the same at date of the timetables as at the time of the accident. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

6. MASTER AND SERVANT—ABROGATION OF RULES AND REGULATIONS.—EVIDENCE showing a violation of rules and regulations as to the running time of trains between stations on two occasions only, and one of them being at the time of an accident, is not sufficient to show that such rules and regulations have been abrogated. (*Konold v. Rio Grande etc. Ry. Co.*, 693.)

7. NEGLIGENCE OF RAILROAD EMPLOYEES—PROOF—NONSUIT.—In an action against a railroad company for negligence, where the plaintiff's case rests solely on the failure of the defendant's servants to take him beyond the tracks in the defendant's station, the defendant is entitled to a nonsuit, where the evidence shows that the plaintiff was taken beyond the defendant's premises to a safe place, there being nothing in his condition to indicate that it was unsafe to leave him alone, and he turned and re-entered the station and was injured twenty minutes later on a track that did not lie within his course, since there is no causal connection between the alleged negligence and the accident. (*Bagard v. Consolidated Traction Co.*, 498.)

8. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE. — A NEWSBOY WHO JUMPS on and off a moving street-car to sell his newspapers, who does not signal the car to stop to receive him or to allow him to alight; who does not ask leave to board the car, and who jumps on and off under circumstances which clearly indicate no purpose to pay fare and no aim to be transported, but only to

avail himself of the presence of persons thereon to buy his papers, is in no sense a passenger. The company owes to him only the duty of ordinary care, and if he is a child only ten years of age, and is knocked off of a moving car and injured, by coming in contact with the tongue of a wagon or the horses attached thereto, the question of his contributory negligence is for the jury. (*Padgett v. Moll*, 347.)

9. RAILROADS—STOPPING TRAIN TO RID IT OF TRESPASSERS—NECESSITY OF.—It is not necessary, under all circumstances, for a railway company to stop its train before ridding it of the presence of willful trespassers. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

10. RAILROADS—TRESPASSERS—POWER TO CAUSE UNLAWFUL CONDUCT TO CEASE.—A railway company may lawfully require a willful trespasser upon one of its moving trains to immediately cease his unlawful conduct by such means as not to indicate a willingness to deprive him of his self-control in leaving the train, if the speed of the train is not so great that a personal injury to him should be expected to occur, where due consideration is given to the duty of the trespasser to cease his lawlessness by all reasonable means in his power, and there is a reasonable expectation that he will use such means in attempting to do it. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

11. RAILROADS—TRESPASSERS—WILLFUL INJURY TO—INDICATION OF.—It is not sufficient to indicate an intentional injury to a willful trespasser on a railway train that the party causing the injury had reasonable ground to expect that such a result was within reasonable probabilities. Otherwise a violation of the duty to exercise ordinary care would of itself be sufficient to indicate such injury. The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or, being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences, to warrant saying, reasonably, that the circumstances indicate willingness to perpetrate such injury. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

12. RAILROADS—TRESPASSERS—INJURY TO, WHEN NOT WILLFUL.—If a willful trespasser riding on the bumpers of a freight train, moving at the rate of about four miles an hour, is commanded by a conductor to leave the train, and in doing so such trespasser falls under the wheels of a moving car and is crushed, so that he dies a few days afterward, it cannot be said that the conductor was guilty of willfully injuring the deceased, where he did not touch him or threaten violence to him, or do anything reasonably indicating that he was about to physically compel the deceased to cease the trespass and to accept imminent danger of receiving a personal injury in doing so; where he had reasonable ground to believe that persons of the trespasser's class were skilled in jumping on and off trains under the existing circumstances; and where he used no such means to enforce his command as would cause the trespasser to momentarily lose his judgment or self-control. (*Bolin v. Chicago etc. Ry. Co.*, 911.)

13. RAILROADS—NEGLIGENCE IN PERMITTING THROWING OUT MAIL BAGS.—A declaration alleging that a railroad company, by its servants, "made a practice" of permitting and allowing a mail pouch to be ejected from one of its through trains in a negligent manner, sufficiently avers the company's knowledge of the dangerous practice. (*Shaw v. Chicago etc. Ry. Co.*, 230.)

14. RAILROADS—THROWING OUT MAILBAGS—EVIDENCE OF PREVIOUS ACTS.—In an action against a railroad company for injuries caused to a prospective passenger sitting in the waiting-room at a station, by the negligent ejection of a mail pouch, which went through a depot window, evidence of the mail agent's previous negligent acts in throwing out the pouch should be submitted to the jury where the previous acts were such that, in common prudence, the defendant ought to have anticipated that such an accident was liable to happen. (*Shaw v. Chicago etc. Ry. Co.*, 230.)

15. RAILROADS—MAIL AGENTS, LIABILITY FOR ACTS OF. A railroad company is not primarily liable for the negligence of a mail agent, but it does owe the duty of not permitting dangerous habits of the agent, in delivering heavy packages from the car in such a manner as to endanger persons lawfully on its premises, to continue; and evidence of such a practice, continued for a considerable period, is notice to the company, which is answerable for the nonperformance of such duty. (*Shaw v. Chicago etc. Ry. Co.*, 230.)

16. NEGLIGENCE—THROWING MAIL BAGS FROM TRAIN—EVIDENCE OF SIMILAR REMOTE TRANSACTION.—In an action for personal injuries caused by the negligent throwing of a mail pouch from a train at a station, evidence of a similar transaction occurring thirteen or fourteen years before the trial is not improperly admitted, though it might properly have been stricken out on motion as remote. (*Shaw v. Chicago etc. Ry. Co.*, 230.)

17. NEGLIGENCE—PROXIMATE CAUSE.—If a railway company runs its engine through the streets of a town at an unusual rate of speed, thereby striking a person and hurling his body against that of a third person standing on the railroad station platform, and thereby injuring the latter, such injury is not the natural and probable consequence of the railway company's negligence, nor could it have been foreseen or reasonably anticipated as the probable result of such negligence, and under such circumstances there can be no recovery. (*Evansville etc. Ry. Co. v. Welch*, 102.)

18. STREET RAILWAYS—INJURY TO CHILD IN STREET.—Though a boy a little less than seven years of age is upon a public street in the daytime, unaccompanied by his parents or any custodian, and is run over by a street-car and injured, it is for the jury to determine, in an action by his father for loss of services, whether the boy was guilty of contributory negligence, and whether his parents were guilty of negligence in thus permitting him to be alone upon the street. (*Holdridge v. Mendenhall*, 871.)

19. STREET RAILWAYS—INJURY TO CHILD IN STREET—EXCESSIVE SPEED OF CAR.—If a motorman on a street-car has no reason to anticipate that a boy, less than seven years of age, will suddenly and unexpectedly dart in front of the car, while in motion and only a few feet distant, and when it cannot be stopped, or an effective warning given, whatever may be the speed of the car, he cannot be called negligent, and if the child, in so doing, is run over and injured, it cannot be said that the proximate cause of the injury was the car's excessive speed. (*Holdridge v. Mendenhall*, 871.)

See Carriers.

RECEIVERS.

1. RECEIVERS—APPOINTMENT IN ANOTHER STATE—TITLE OF.—A receiver appointed for a foreign corporation in one

state does not thereby acquire such title to the property of the corporation situated in another state as to defeat an attachment subsequently issued at the instance of a creditor by a court of the latter state. (*Gray v. Covert*, 117.)

2. **RECEIVERS—STOCKHOLDER AS.**—The appointment of a receiver for an insolvent corporation cannot be avoided on the bare ground that the person appointed is a stockholder in such corporation, and has been negligent as such, or that he is a nonresident of the parish, when the latter issue is not raised by the pleadings. (*McGilliard v. Donaldsonville etc. Works*, 145.)

3. **RECEIVERS—STOCKHOLDER AS.**—The appointment of a receiver should stand until it is made evident that he is not a proper person, and, ordinarily, the fact that he is a stockholder or has an interest in the receivership property is a recommendation that he will guard the interests of his fellow-stockholders and creditors as well as his own. It cannot be assumed that the receiver appointed is not a proper person simply and exclusively because he is a stockholder. (*McGilliard v. Donaldsonville etc. Works*, 145.)

4. **RECEIVERS—REMOVAL.**—To induce an appellate court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is generally necessary to show some overwhelming objection in point of propriety, or some fatal objection upon principle in the person named. (*McGilliard v. Donaldsonville etc. Works*, 145.)

5. **RECEIVERS—REMOVAL.**—Creditors who have admitted the necessity of an appointment of a receiver, and who have made application for another appointment than that made, cannot urge successfully that the proceedings for the prior appointment are null, because of defect or insufficiency in the pleadings. (*McGilliard v. Donaldsonville etc. Works*, 145.)

RENT.

See Landlord and Tenant.

REPLEVIN.

1. **REPLEVIN—PLEADING—TITLE.**—A petition in replevin averring that plaintiff is the owner and lawfully entitled to the possession of the property, is sufficient to show his interest therein and enable him to maintain his action. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

2. **REPLEVIN OF MORTGAGED LIVESTOCK BY PURCHASER OF NOTE.**—A bona fide purchaser of a note secured by chattel mortgage on livestock from the maker or his representative is, as against such mortgagor, entitled to all the rights of the original mortgagee, and may maintain replevin for the livestock without first resorting to a court of equity to establish his right. (*First Nat. Bank of Mexico v. Ragsdale*, 332.)

3. **REPLEVIN—DAMAGES FOR USE OF PROPERTY.**—In an action of replevin a jury may assess damages for the use of the property during the time it is withheld. (*Nash v. Larson*, 272.)

REPORTERS.

See Court Reporters.

RES JUDICATA.

See Judgments, 6-9; Naturalization, 3; Partition, 3; Wills, 6.

RETROACTIVE STATUTES.

See Constitutional Law, 3-7.

REVENUE LAW.

REVENUE STAMPS—EVIDENCE.—Congress has power to impose stamp duties and to prescribe penalties for their nonpayment, and to provide that certain instruments, unless stamped, shall not be admissible as evidence in the courts of the United States. (*Small v. Slocumb*, 50.)

SALARY.

See Officers.

SALES.

1. **SALES—CONDITIONAL—REMEDY OF VENDOR UPON DEFAULT.**—A vendor of property, who retains the legal title in himself until the purchase price is paid, may, upon default in payment, retake the property and thus disaffirm the sale, or he may treat the sale as absolute, and bring an action for the price. (*Turk v. Carnahan*, 85.)

2. **SALES—CONDITIONAL, REMEDY OF VENDOR UPON DEFAULT.**—A vendor of property, who retains the legal title in himself until the purchase price is paid, cannot, upon default of payment, take possession of the property, sell or otherwise dispose of it, and then sue the vendee for the balance of the purchase price. (*Turk v. Carnahan*, 85.)

3. **SALES—PROPERTY NOT IN EXISTENCE.**—While there can be no sale of an article which is not in existence, a person may legally enter into an executory contract to sell such article in future, when it comes into existence. (*Forsyth Mfg. Co. v. Castlen*, 28.)

4. **SALES—PROPERTY NOT IN EXISTENCE.**—An executory contract for the sale of goods for future delivery is not void by reason of the fact that at its date the vendor does not have the goods, has not entered into any arrangement to buy them, and has no expectation of receiving them, except by going into the market and buying or otherwise acquiring them, unless it is the intention of both parties to the contract that the goods shall not be actually delivered, but that there shall be a settlement of the differences between them, according to the market value of the article, on a given day. In the latter event, such contract is a wager and not enforceable by either party. (*Forsyth Mfg. Co. v. Castlen*, 28.)

5. **CONTRACTS—SALE OF GOODS NOT IN EXISTENCE.**—A contract for the future delivery of goods not then in existence is not a wagering contract, when actual delivery of the goods is contemplated by either one or both of the parties. (*Forsyth Mfg. Co. v. Castlen*, 28.)

6. **CONTRACTS—SALE OF GOODS NOT IN EXISTENCE—EVIDENCE TO VARY.**—If a written contract for the future sale of goods not then in existence, of a certain description, fails to call for the delivery of any specified or particular goods, parol evidence is not admissible to show a collateral agreement that the goods

described were to be raised on the lands of the seller. In such case, the seller may deliver any goods of the class and quality described in the contract, no matter by whom made or produced. (*Forsyth Mfg. Co. v. Castlen*, 28.)

7. **SALES—GOODS NOT IN EXISTENCE.**—If a contract for the future sale of goods not then in existence is valid, the fact that the seller cannot comply with the contract in the manner in which he intended, when that mode of compliance is not made a part of the contract itself, does not prevent him from complying in some other way open to him at the time he is bound to perform. (*Forsyth Mfg. Co. v. Castlen*, 28.)

8. **SALES—GOODS NOT IN EXISTENCE—EVIDENCE OF INTENT.**—In determining the validity of a contract for the future sale of cotton not then in existence, depending upon the intention of the parties at the time the contract is entered into, evidence is admissible to show that the seller is a cotton planter, and had cotton actually planted and growing at the time of making the contract. (*Forsyth Mfg. Co. v. Castlen*, 28.)

SERVITUDES.

See Easements.

SETOFF.

1. **JUDGMENTS—SETOFF AGAINST—MERE INSOLVENCY** of a judgment creditor does not of itself justify an injunction against the enforcement of a judgment at law, in order to let in a setoff which might have been pleaded in the action in which such judgment was recovered. (*Zinn v. Dawson*, 772.)

2. **JUDGMENTS—SETOFF AGAINST—EQUITABLE RELIEF.** A person who allows a judgment by default to go against him, having a judgment at that time against the plaintiff which he might have pleaded as a setoff, cannot, on the ground of mistake, as to the time when the case was to be tried, together with the insolvency of the plaintiff, obtain the benefit of such setoff in equity. (*Zinn v. Dawson*, 772.)

3. **JUDGMENTS—SETOFF AGAINST—REMEDY.**—If a person at the time judgment is obtained against him, holds judgments against the plaintiff, he is not compelled to plead them as a setoff in such action, but may, after notice and on motion have his judgments set off against plaintiff's judgment, and having thus a plain, adequate, and complete remedy at law he cannot come into equity for relief. (*Zinn v. Dawson*, 772.)

See Executors and Administrators, 12.

SHEEP HERDING.

See Trespass, 5.

SHIPPING.

VESSELS—WHAT IS A "BOAT"—ATTACHMENT.—A statute relating to the attachment of boats and their liability for certain debts does not apply to a steam dredge and amalgamator used solely for mining purposes and called a "boat." Hence, where a plaintiff recovers judgment under such statute against such boat, which is retaken by the defendant on a redelivery bond, the plaintiff cannot recover on such bond, since the court was without jurisdiction to render the original judgment. (*Dietrich v. Martin*, 4.9.)

SICK BENEFITS.

See Associations, 1-4.

SLOT MACHINES.

See Lottery.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—AGREEMENT TO MAKE WILL.—An agreement to dispose of property in a certain manner by will cannot be specifically enforced in the lifetime of the testator, nor after his death, because it is no longer possible for him to make the will, but equity can do what is equivalent to specific performance, by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with the terms of such agreement, upon the ground that it is charged with a trust in the hands of the heir, devisee, personal representative, or purchaser, with notice of the agreement. (*Burdine v. Burdine*, 741.)

2. CONTRACTS TO DEVISE LANDS SIGNED BY ONE PARTY—STATUTE OF FRAUDS.—Although an agreement to devise land or bequeath personalty in consideration for personal services to be rendered is signed only by the intended testator, yet if such services have been rendered, the agreement is binding on him, and upon its breach may after his death be enforced against his estate. (*Burdine v. Burdine*, 741.)

3. SPECIFIC PERFORMANCE OF A UNILATERAL CONTRACT. may be enforced against the party signing it, the other requisites for specific performance existing, although the other party did not sign, and there is no mutuality of remedies between them at the time the agreement is made, as the filing of a bill for specific performance by the other party makes the remedy and the obligation mutual. (*Burdine v. Burdine*, 741.)

4. CONTRACTS—CONSIDERATION—SPECIFIC PERFORMANCE.—If two persons engaged in buying lands in the same locality, to avoid competition and secure the lands at low rates, agree that one shall buy for both, and that the lands purchased shall be divided between them, and one of them retires from business while the other buys the lands according to the agreement, taking deeds therefor in his own name and then transfers them to a third person, who promises to discharge the agreement to divide, but subsequently refuses to do so, equity may decree specific performance. (*Camden v. Dewing*, 797.)

STAMPS.

See Revenue Law.

STARE DECISIS.

1. JUDGMENTS—STARE DECISIS.—A judgment of a court of appeals becomes the law of the case upon a new trial in the circuit court, and that court has no right to disregard it, unless the facts appearing upon the second trial are essentially different from those before the court of appeals when it rendered its first decision. (*Bealey v. Smith*, 317.)

2. JUDGMENTS—STARE DECISIS—SECOND APPEAL.—If a case comes before an appellate court a second time, it is entirely within the power of that court to hear, or refuse to hear, argument again upon the propositions decided by it when the case was before heard. (*Bealey v. Smith*, 317.)

3. JUDGMENTS—STARE DECISIS.—An appellate court may review and reverse its former decision, even in the same case, if it is satisfied that gross or manifest injustice has been done by its former decision, or if mischiefs to be cured far outweigh any injury that might be done in the particular case by overruling prior decisions. (*Bealey v. Smith*, 317.)

4. JUDGMENTS—STARE DECISIS—CONSTITUTIONAL LAW. The refusal of a court of appeals to review its decision on a former appeal does not relieve the supreme court, when the case is properly before it, from obeying the constitutional mandate to rehear and determine the case. (*Bealey v. Smith*, 317.)

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

See Constitutional Law.

STEAM DREDGE.

See Shipping.

STENOGRAPHIC REPORTERS.

See Court Reporters.

STREET RAILWAY.

See Railroads, 18, 19.

SUBAGENTS.

See Agency, 3.

SURETIES.

See Judgments.

TAXATION.

See Constitutional Law, 15.

TELEPHONE COMPANY.

TELEPHONE COMPANIES—RIGHT TO CUT BRANCHES FROM TREES IN HIGHWAY.—If a telephone company is given the right to erect a line along a highway, it must, of necessity, have the right to remove obstructions. Hence, it may, in a proper manner, trim trees to obtain a free passage for its wires, without first giving the abutting owner an opportunity to do such cutting, but the company must answer for any unnecessary, improper, or excessive cutting. (*Wyant v. Central Teleph. Co.*, 155.)

TITLE DEEDS.

See Deeds, 5-7.

TITLE OF STATUTES.

See Constitutional Law, 1, 2.

TORTS.

See Action; Corporations, 6.

TRAMPS.

See Constitutional Law, 10-13.

TRESPASS.

1. TRESPASS OF CATTLE—LIABILITY FOR PASTURAGE.—

From the facts that an owner of sheep herds and pastures them on the land of another for a stated period of time, and that such pasturage is worth a stated amount, the law creates an implied promise to pay for the pasturage, although the sheep were wrongfully on the land. (Monroe v. Cannon, 439.)

2. TRESPASS ON UNINCLOSED LAND.—AT COMMON LAW

every man's land was deemed to be inclosed, either by a visible or invisible fence, and every unwarrantable entry on such land necessarily carried with it some damage for which the trespasser was liable. (Monroe v. Cannon, 439.)

3. TRESPASS OF CATTLE.—AT COMMON LAW

a man is answerable not only for his own trespass, but for that of his cattle also. (Monroe v. Cannon, 439.)

4. TRESPASS OF CATTLE—UNINCLOSED LAND.—UNDER

A STATUTE providing that the owner of domestic animals which trespass upon land inclosed by a legal fence is liable for all damages caused thereby, he is not liable for a trespass committed by his cattle upon uninclosed land when they are lawfully running at large. (Monroe v. Cannon, 439.)

5. TRESPASS—HERDING OF SHEEP ON UNINCLOSED

LAND.—An owner of sheep who herds and pastures them on the uninclosed land of another is liable in assumpsit for the value of the grass destroyed by the sheep, notwithstanding a statute which provides that the owner of an animal which breaks into a legally fenced inclosure shall be liable for the resulting damage, since such statute does not apply to a case where one knowingly and willfully herds his cattle on the uninclosed land of another. (Monroe v. Cannon, 439.)

TRIAL.

1. JURY TRIAL—RIGHT TO.—PROCEEDINGS TO TRY THE

TITLE TO AN OFFICE constitute a civil action in which controverted questions of fact are triable by a jury as a matter of right. (State v. McDonald, 878.)

2. CONSTITUTIONAL LAW—CRIMINAL TRIALS—ASSIST-

ANCE OF COUNSEL.—Under a constitutional guaranty that a person accused of crime shall have the assistance of counsel, counsel appointed to defend the accused must be given a reasonable time to prepare his defense, to investigate the facts, and examine the law applicable to the case. (State v. Collins, 150.)

3. CRIMINAL LAW—TIME TO PREPARE FOR TRIAL—AS-

SISTANCE OF COUNSEL.—If an indictment for murder is returned, the accused assigned counsel, arraigned, and the case set for trial on one day, the day of trial being fixed for three days

thereafter, it is error to refuse to grant a postponement applied for by the accused and his counsel on the ground that the latter, because of pressure of other law business, has no time in the interval to prepare the defense. (*State v. Collins*, 150.)

4. JUSTICE'S COURT—PEREMPTORY CHALLENGE.—ONE OF THE REGULAR PANEL of jurors in a justice's court cannot be excused on a peremptory challenge. (*Reed v. Peacock*, 194.)

5. TRIAL—CHALLENGE FOR CAUSE—ODD FELLOWS.—It is no ground of challenge for cause where the plaintiff sues as assignee of an Odd Fellows' lodge, to which he belongs, that a juror is a member of the same order, but not of the same lodge. (*Reed v. Peacock*, 194.)

6. TRIAL—JUSTICE'S COURT — EXCUSING JURORS.—IT IS ERROR for a justice of the peace to excuse a talesman for the reason that he is not a taxpayer if there is nothing to show that he does not possess the necessary qualifications of an elector. (*Reed v. Peacock*, 194.)

7. TRIAL—FINDING—CONSTRUCTION OF.—Under the circumstances of this case, a finding of the jury that a person promised and agreed to devise real estate was held to be equivalent merely to a finding that there was an oral agreement to devise the property, and not a written one. (*Martin v. Martin*, 895.)

8. TRIAL — AFFIDAVIT FOR CONTINUANCE — WHEN READING OF, IS ERROR.—If a defendant, in an action for personal injuries, moves, on the day of trial, for a continuance on the ground of the absence of a material witness, and files an affidavit setting up what he would testify to if present, and the plaintiff makes the admission which would authorize the affidavit to be read, whereupon the court, for its own convenience, postpones the trial for more than a month, it is error, when the case is finally called for trial, and where no showing of any further effort to obtain the absent witness is made, to permit the affidavit to be read against the plaintiff's objection, where it shows on its face that the witness lives in the city where the injury occurred, and in which the trial is had, because sufficient time has been given in which to ascertain whether or not the evidence is attainable. (*Padgett v. Moll*, 347.)

9. TRIAL—INABILITY OF JURY TO AGREE—ERROR IN RECALLING JURY TO HEAR NOTES OF STENOGRAPHER READ.—The purpose of having the testimony at a trial taken down in shorthand is to preserve it for future reference after the trial, and for the judge's convenience to refresh his memory in reviewing the case or settling a bill of exceptions. Such notes are not for the use of the jury, and if the jury, after retirement, send a note to the judge requesting a transcript of the testimony of certain witnesses, saying that they cannot agree without such transcript, it is error for the court, without the consent of counsel on both sides, to allow the stenographer to read to the jury his notes of the testimony of such witnesses. (*Padgett v. Moll*, 347.)

See Instructions.

TRUSTS.

1. TRUSTS AND TRUSTEES—DEPOSIT IN BANK BY GUARDIAN—PREFERENCES.—Money deposited in bank as a general and not a special deposit by a guardian of minors, known by the bank to be thus deposited by him as trustee for them, cannot

be paid in preference to the claims of other depositors in case of insolvency or assignment by such bank. Such general deposit passes the title thereto to the bank, and the relation of debtor and creditor, and not trustee and cestui que trust, is created between the bank and the guardian. (Paul v. Draper, 296.)

2. TRUSTS AND TRUSTEES—PURCHASER'S NOTICE.—A trustee in a deed to secure bona fide creditors is a purchaser for value, and notice to him is notice to the beneficiaries. (Merchants' Bank v. Ballou, 715.)

3. TRUSTS AND TRUSTEES—SUBSTITUTED TRUSTEE.—The relation of principal and agent between the trustee named in a deed to secure creditors and the beneficiaries begins when the transaction is completed. The acceptance of the trustee is presumed until he declines. If he refuses to act and a successor is appointed, the latter is substituted to all the rights and responsibilities of the position as if he had been originally appointed, and the trust in his hands is tainted with all the imperfections that attached to it in the hands of the original trustee. (Merchants' Bank v. Ballou, 715.)

4. TRUSTS AND TRUSTEES—NOTICE TO TRUSTEE IS NOTICE TO BENEFICIARY.—A beneficiary in a deed of trust is affected with notice to the trustee, although the latter did not know of the existence of the deed of trust until it was recorded, and then immediately declined to act as trustee. (Merchants' Bank v. Ballou, 715.)

5. TRUSTS AND TRUSTEES.—TO CONSTITUTE A RESULTING TRUST arising out of a contract of purchase of land, the money of the cestui que trust must be used at the time of the purchase, or enter into the consideration therefor, or must thereafter be applied in pursuance of such purchase. (Moore v. Mustoe, 812.)

6. TRUSTS AND TRUSTEES — EXPRESS TRUSTS — ENFORCEMENT.—An express trust in lands may be enforced if the possession thereof is held by the cestui que trust, who makes valuable improvements on the lands in pursuance of a contract of purchase. (Moore v. Mustoe, 812.)

See Monopolies.

ULTRA VIRES.

See Municipal Corporations, 1, 2.

UNCONSCIONABLE CONTRACTS.

See Building and Loan Associations.

USURY.

1. USURY—DISCHARGE OF DEED OF TRUST.—A debtor may plead usurious payments made by him, as a discharge to that extent, of his obligation given, as a fact preliminary to his right to have discharged and canceled by the court the deed of trust given as security for such obligation. (Vandergrif v. Swinney, 325.)

2. USURY IS AS MUCH MATTER OF AFFIRMATIVE RELIEF as it is a ground of defense. (Vandergrif v. Swinney, 325.)

3. USURY.—EQUITY MAY AID A PERSON to recover back usurious interest once paid. (Vandergrif v. Swinney, 325.)

4. USURY—COMMISSIONS.—If an agent to negotiate a loan agrees with the lender to deposit with him, out of commissions to

be paid by the borrower, a certain percentage of the amount loaned, as a guaranty of his payment, this does not constitute such agent the agent of the lender nor make the loan usurious, although the latter charges and receives the maximum legal rate of interest on the loan. (*West v. Equitable Mortgage Co.*, 59.)

5. **USURY—COMMISSIONS.**—If an agent to negotiate a loan is a corporation, in which the lender owns stock, the fact that, in addition to receiving the lawful rate of interest for the money loaned, he also shares as a stockholder in the commissions paid for obtaining the loan does not make the loan usurious. (*West v. Equitable Mortgage Co.*, 59.)

See Insurance, 17.

VAGRANCY.

See Constitutional Law, 10-13.

VENDOR AND VENDEE.

VENDOR AND PURCHASER—INJUNCTION AGAINST TIMBER CUTTING.—A vendor of land who retains title thereto as security for the purchase money cannot enjoin the vendee from clearing the land and cutting the timber thereon, unless the value of the land is thereby impaired. (*Small v. Slocumb*, 50.)

VENUE.

See Appeal, 10; Embezzlement, 3.

VESSELS.

See Shipping.

WAGERS.

1. **WAGERS—PAYMENT AFTER NOTICE BY STAKEHOLDER.**—A stakeholder, who pays over money bet on an election after notification not to do so by one of the parties to the wager, pays at his peril, and if after such notice the stakeholder disregards it, an action may be maintained against him for the money. (*Pabst Brewing Co. v. Liston*, 275.)

2. **WAGERS—ELECTIONS.**—A wager on the result of an election is illegal and void. (*Pabst Brewing Co. v. Liston*, 275.)

3. **WAGERS—NOTICE TO STAKEHOLDER.**—Notice given by one of the parties to a stakeholder, the day after an election and before money wagered thereon is paid over, not to so pay it, is sufficient to arrest it in the hands of the stakeholder, and is a repudiation of the wager. (*Pabst Brewing Co. v. Liston*, 275.)

4. **WAGERS—STAKEHOLDER, GARNISHMENT OF.**—If a stakeholder of a wager has parted with the money wagered after notice not to pay it over, garnishment proceedings may be maintained against him without demand for payment. In such case the liability of the stakeholder is an indebtedness as for money had and received. (*Pabst Brewing Co. v. Liston*, 275.)

WAGES.

See Adoption, 3-5.

WATER COMPANIES.

WATER COMPANIES—FAILURE TO SUPPLY WATER—LIABILITY FOR LOSS BY FIRE.—Where a water company expressly contracts to supply water to a factory for fire purposes, and by reason of a failure to do so the factory is destroyed by fire, the water company is liable for the resulting loss, notwithstanding the failure to supply the water was due to the breaking of pipes without any fault on the part of the water company. (*Middlesex Water Co. v. Knappmann Whiting Co.*, 467.)

WATERS AND WATERCOURSES.

1. **WATERS AND WATERCOURSES — APPROPRIATION—PERCOLATING WATERS.**—A statute conferring the right to divert and use the unappropriated water of "any natural stream, watercourse, lake, spring, or other natural source of supply," must be construed to mean a natural stream or other natural source of supply flowing or situated upon lands over which the sovereignty has dominion or which forms a part of the public domain, and not to streams or springs, or other waters arising through percolation upon land after it had been segregated from the public domain and the title thereto passed into private ownership. The statute cannot be so interpreted as to include a stream flowing from a bog or marsh, which does not make its appearance upon the surface until after the land has passed into private ownership. (*Willow Creek Irr. Co. v. Michaelson*, 687.)

2. **WATERS AND WATERCOURSES — PERCOLATING WATERS—APPROPRIATION.**—Water percolating through the soil, or flowing in a subterranean stream, having no defined or known channels, courses, or banks, forms a part of the realty, and belongs to the owner of the soil and is not subject to appropriation. (*Willow Creek Irr. Co. v. Michaelson*, 687.)

3. **WATERS AND WATERCOURSES — PERCOLATING WATERS—OWNERSHIP.**—A conveyance or grant by the United States of any part of the public domain to a person, natural or artificial, carries with it the right to filtrating or percolating water and to streams flowing in the soil beneath the surface in undefined and unknown channels. (*Willow Creek Irr. Co. v. Michaelson*, 687.)

4. **WATERS AND WATERCOURSES — PERCOLATING WATERS.**—Water intermingling with the ground or flowing through it by filtration or percolation, or by chemical attraction, is but a component part of the earth, and has no characteristic of ownership distinct from the land itself. (*Willow Creek Irr. Co. v. Michaelson*, 687.)

5. **A WATER RIGHT** is the legal right to use water. (*Smith v. Denniff*, 408.)

6. **WATER RIGHT DEFINED.**—The right to the use of running water is a corporeal right running with riparian land, which can be acquired only by the grant, express or implied, of the owner of the land and water. (*Smith v. Denniff*, 408.)

7. **WATERS — APPROPRIATION — PUBLIC DOMAIN**—The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as owner of the land and water, and applies only to the public domain. Hence, when the title to riparian land has passed to a private individual, no right by appropriation can be acquired under the grant from Congress, and the common-law rule as to the rights

of riparian owners applies, in the absence of a state statute to the contrary. (*Smith v. Denniff*, 408.)

8. **WATERS—RIGHT TO APPROPRIATE—TRESPASSERS.**—Where the title to land bordering on a stream is vested in private individuals, the right to appropriate the water of such stream can be exercised only by one who has riparian rights, either as owner of the riparian land or through grant of the riparian owner, and a trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein. (*Smith v. Denniff*, 408.)

9. **WATER RIGHT ON ANOTHER'S LAND—EASEMENT.**—One cannot acquire a water right on the land of another without acquiring an easement in such land. (*Smith v. Denniff*, 408.)

10. **WATERS—APPROPRIATION TO PUBLIC USE—EMINENT DOMAIN.**—The right to appropriate water on the land of another for a public use may be obtained through condemnation proceedings under the right of eminent domain. (*Smith v. Denniff*, 408.)

11. **WATERS—EASEMENT APPURTENANT TO LAND.**—The right to take water from or across the land of another is in the nature of an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto. (*Smith v. Denniff*, 408.)

12. **WATERS—EASEMENT—APPURTENANCE.—A DITCH ON A RIPARIAN OWNER'S LAND** and the water right in it are part and parcel of the land. They cannot be easements, and, therefore, are not appurtenant to the land. (*Smith v. Denniff*, 408.)

13. **WATER RIGHT—RIPARIAN OWNER—APPURTENANCE.** Where a riparian proprietor appropriates water to use on his own land, the right to have the water flow in the stream to the head of his ditch is an easement in the stream and a servitude upon upper riparian lands; hence his water right is an appurtenance to his land, and a conveyance in writing of such land passes the water right as an appurtenance thereto, if at the time he had title both to the land and the water right. (*Smith v. Denniff*, 408.)

14. **WATER RIGHT ON NONRIPARIAN LAND—EASEMENT—APPURTENANCE.**—Where a nonriparian owner of land obtains the right to take water from a stream and to conduct it over the land of another, and thereby makes a valid appropriation of a water right, and uses it on his nonriparian land, such water right and ditch are easements in, or servitudes upon, the land of another, and, therefore, are appurtenances to his nonriparian land, and a conveyance of his land would pass the water right and ditch as appurtenances thereto. (*Smith v. Denniff*, 408.)

15. **WATER RIGHT—TITLE TO LAND ON WHICH WATER IS USED.**—The legal title to the land upon which a water right lawfully acquired by appropriation on the public domain is used, or intended to be used, in nowise affects the appropriator's title to the water right. (*Smith v. Denniff*, 408.)

16. **WATER RIGHT—POSSESSORY RIGHT TO RIPARIAN LAND—EASEMENT NOT APPURTENANT.**—When one has a possessory right to government riparian land, and has made a valid appropriation of a water right to use on such land, such water right cannot become an appurtenance to the land until he obtains title thereto, or transfers his title to the water right to the owner of the land, since the water right, being an easement in the stream, can become legally attached as an appurtenance to the land only

by a unity of title in the same person to both the dominant estate and the easement claimed. (*Smith v. Denniff*, 408.)

17. **WATER RIGHT — POSSESSORY RIGHT TO NONRIPARIAN LAND—EASEMENT NOT APPURTENANT.**—One who is in rightful possession of nonriparian land under a contract with the owner, and who legally acquires a water right by appropriation thereof on the public domain for use on the land he occupies, has a legal title to the water right, distinct from his estate in the land, and such water right not being appurtenant to the land, he may execute a valid mortgage thereof, though he fails to acquire title to the land included in the mortgage, upon which the water is used. (*Smith v. Denniff*, 408.)

18. **WATER RIGHT — APPURTENANCES — BURDEN OF PROOF.**—One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator. (*Smith v. Denniff*, 408.)

19. **WATER RIGHT—ABANDONMENT — MORTGAGE.**—One who has lawfully appropriated water from the public domain to use on land of which he is in the rightful possession under a contract with the owners does not, by mortgaging his water rights, abandon them so as to defeat the mortgagor's title. (*Smith v. Denniff*, 408.)

20. **WATER RIGHT—MORTGAGE OF—FAILURE TO USE WATER—EFFECT ON MORTGAGEE.**—The fact that a mortgagee of water rights, which have been lawfully appropriated for use on the land of another of which the appropriator has rightful possession, has not used the water will not defeat an action by him against the owner of the land to obtain the possession and use of such water rights, since until foreclosure the mortgagee had no right to possession. (*Smith v. Denniff*, 408.)

21. **EASEMENTS—ARTIFICIAL LAKES.**—If the title to the bed of a lake is not originally in the state, the waters thereof do not become public from the fact that the lake is artificially increased under an easement for mill purposes, and incidentally used by the public during the life of the easement for the purposes of hunting, boating, fishing, and similar uses. (*Albert Lea v. Nielsen*, 242.)

22. **WATERS AND WATERCOURSES—ARTIFICIAL LAKES—EASEMENTS.**—The grantors of an easement to overflow lands owned by them by the construction of a dam for mill purposes are not estopped from claiming damages from a city, maintaining the dam after its abandonment by the mill owners, by the fact that the public were permitted, without protest, to enjoy, for pleasure purposes, the artificial lake formed by the dam, and the city was permitted to make improvements with reference to it for a period of more than twenty years prior to such abandonment. (*Albert Lea v. Nielsen*, 242.)

23. **WATERS AND WATERCOURSES—ARTIFICIAL LAKE—EASEMENT—ESTOPPEL.**—The grantors of an easement to overflow their lands by means of a dam are not estopped from claiming damages from a city maintaining such dam after its abandonment by the grantee of the easement, by the fact that they permit and do not protest against the maintenance of such dam by the city for five years after such abandonment, and that they allow it to erect its waterworks on the bank of the artificial lake formed by such dam. (*Albert Lea v. Nielsen*, 242.)

24. WATERS AND WATERCOURSES — POLLUTION OF STREAM—PRIVIES.—A private corporation which erects privies for the accommodation of a great number of persons, and discharges, through sewers, refuse water, urine and excrement into a natural stream is guilty of a pollution thereof, and a lower riparian owner is entitled to recover for injury inflicted thereby. (*Trevett v. Prison Assn.*, 727.)

25. NUISANCES.—PRIVIES ARE PRIMA FACIE nuisances. and although necessary and indispensable in connection with property and its use, for the ordinary purposes of habitation, yet if they are built, or allowed to remain, in such a condition as to annoy others in the proper enjoyment of their property, they are nuisances per se, and render the person erecting or continuing them liable for all injurious consequences flowing therefrom. (*Trevett v. Prison Assn.*, 727.)

26. WATERS AND WATERCOURSES—POLLUTION—LIABILITY.—The pollution of the waters of a stream by artificial drainage, which causes sewage to flow into such stream, whether done by a private or municipal corporation, or by an individual, constitutes a nuisance which entitles the lower riparian owner to damages therefor. (*Trevett v. Prison Assn.*, 727.)

27. WATERS AND WATERCOURSES—POLLUTION—INJUNCTION.—Any use of a natural stream that materially fouls and adulterates the water, or the discharge or deposit therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, is a violation of the rights of the lower proprietor, for which he is entitled to redress, and anything which renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, constitutes a nuisance, which may be restrained by injunction. (*Trevett v. Prison Assn.*, 727.)

WEIGHING COAL.

See Constitutional Law, 16.

WILLS.

1. WILLS—ATTESTATION — PRESENCE OF TESTATOR.—If, after a testator has signed an instrument intended to be his last will, it is taken by two persons who are present at his request as subscribing witnesses, and they sign the instrument at a table in an adjoining room, a few feet distant, and within easy sound of the testator's voice, but a few feet out of the range of his vision, after which the attesting witnesses immediately return to him and show him their signatures, whereupon he takes the will, looks it over, and pronounces it satisfactory and "all right," this is a sufficient attestation of the will within a statute requiring such attestation to be in the "presence" of the testator. The fact that the will is thus attested a few feet out of the range of the vision of the testator does not vitiate it, especially when the testator could have seen the attesting witnesses sign by taking a few steps, which he was able to do. (*Cunningham v. Cunningham*, 256.)

2. WILLS—ATTESTATION — PRESENCE OF TESTATOR.—In the definition of the phrase "in the presence of the testator," as applied to subscribing witnesses to wills, due regard must be had to the circumstances of each particular case, as the statute does

not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him, and if the witnesses sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are considered to be in his presence. (*Cunningham v. Cunningham*, 256.)

3. **WILLS**.—Illustrations of conditions precedent. (*Markham v. Hufford*, 222.)

4. **WILLS**—QUESTION OF CONDITIONS IS ONE OF INTENTION.—In construing a will, the question as to whether an act on which an estate depends is a condition precedent or a condition subsequent is one of intention, and not of phrase or form. (*Markham v. Hufford*, 222.)

5. **WILLS**—REFORMATION OF BAD HABITS—VALID CONDITION PRECEDENT.—It is a valid condition to require the reformation of bad habits. Hence, a provision in a will for the payment of a legacy to a person at the expiration of two years from the date of the testator's demise, provided that he shall be deemed a reformed man, in the judgment of the executors of the will, does not constitute a vested interest, but is a valid condition, and is not void for uncertainty. (*Markham v. Hufford*, 222.)

6. **RES JUDICATA**—DEFECT IN WILL CONTEST.—The dismissal of a will contest because it fails to state any ground of opposition to the will does not deprive a party of the right to commence and maintain a subsequent contest based upon other grounds. (*Raleigh v. First Judicial Dist. Court*, 431.)

7. **WILL CONTEST**—WHEN MAY BE FILED—WHEN MAY BE INSTITUTED.—The statement of opposition to the probate of a will may be filed at any time prior to the hearing of proof of the will. (*Raleigh v. First Judicial Dist. Court*, 431.)

See *Mandamus*, 2.

WITNESS.

1. **WITNESSES**—DIVORCED WIFE AGAINST HUSBAND.—A divorced wife is not a competent witness against her husband in a criminal prosecution against him for an assault upon a third person occurring during their marriage and after the commencement of divorce proceedings, as to a conversation had with him and statements made by him at the time of the assault, nor as to the fact that he shot at such third party. (*State v. Kodat*, 292.)

2. **HUSBAND AND WIFE**—DIVORCE—PRIVILEGED COMMUNICATIONS.—It is the policy of the law that such matters as are privileged during the marital relation shall remain forever inviolable, whether the relation has ceased by reason of death or divorce, and a divorced wife, from reasons of public policy, is incompetent to testify against her former husband to the same extent as if the marriage had not been dissolved. (*State v. Kodat*, 292.)

3. **EVIDENCE**—DECEASED PARTNER—COMPETENCY OF WITNESS.—A person who makes a contract with two partners, together with the surviving partner who was present when the contract was made, is competent to testify about such contract after the death of the other partner. (*Vandergrif v. Swinney*, 325.)

4. **TRIAL**—EVIDENCE OF OWNERSHIP—CONCLUSION OF WITNESS.—When ownership is a material fact to be determined in

an action, and the answer of a witness as to ownership involves his construction of facts or his conclusions as to what they establish, it is error to permit him to testify to the ultimate fact of ownership; but if a direct answer is subsequently qualified by a statement of the facts relative to it, and discloses the facts upon which the answer is based, the error is cured, and is not ground for reversal. (*Olson v. O'Connor*, 595.)

5. TRIAL.—EVIDENCE OF OWNERSHIP—DIRECT TESTIMONY OF WITNESS.—Ordinarily, the title to property is a simple fact, to which a witness having the requisite knowledge can testify directly. Hence, in an action to recover damages for the conversion of property, a witness may testify directly, in the first instance, who owned the property, where he is personally familiar with all the facts so that he can do so positively, and not as a mere opinion. (*Olson v. O'Connor*, 595.)

See Deeds, 3; Evidence.





